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United States 1098
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
SNOHOMISH RIVER BOOM COMPANY, a Cor-
poration, and EVERETT IMPROVEMENT
COMPANY, a Corporation,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

Filed
APR 21 1917
F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation, and EVERETT IMPROVEMENT COMPANY, a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Cor-
poration, and EVERETT IMPROVEMENT
COMPANY, a Corporation,

Defendants.

Names and Addresses of Counsel.

CLAY ALLEN, Esq., United States Attorney,
Attorney for Plaintiff in Error,
Room 310 Federal Building, Seattle, Wash-
ington.

WINTER S. MARTIN, Esq., Assistant United
States Attorney, Attorney for Plaintiff in Error,
Room 310 Federal Building, Seattle, Wash-
ington.

J. A. COLEMAN, Esq., Attorney for Defendants in
Error,
Everett, Washington. [1*]

*Page-number appearing at foot of page of original certified Transcript
of Record.

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation,
and EVERETT IMPROVEMENT
COMPANY, a Corporation,

Defendants.

Complaint.

Comes now the plaintiff by C. F. Riddell, United States Attorney, and E. B. Brockway, Assistant United States Attorney, for the Western District of Washington, and for a cause of action against the defendants and each of them respectfully shows to the court:

I.

That the plaintiff herein is the United States of America; that the defendant, Snohomish River Boom Company, is a corporation, duly organized and doing business under the laws of the State of Washington, and that the defendant, Everett Improvement Company, is a corporation, duly organized and doing business under the laws of the State of Washington.

II.

This is an action brought by the United States of America to secure the possession from the defend-

ants, and each of them, of certain property hereinafter more particularly described, situated in Snohomish County, Washington, and within the Northern Division of the Western District of Washington, and to recover for the use and possession of such property by the defendants. [2]

III.

That on or about December 23, 1873, U. S. Grant, the then President of the United States, acting in accordance with the treaty with the Dwamish and other tribes of Indians, of January 22, 1855, and in accordance with the authority in him vested, set apart as an Indian reservation by executive order, the following described property, being at that time a portion of the public domain of the United States of America, to wit,

Beginning at low-water mark on the north shore of Steamboat Slough at a point where the section line between sections 32 and 33 of township 30 north, range 5 east intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5, to the township line between townships 30 and 31; thence west on said township line to low-water mark on the shore of Port Susan; thence southeasterly with the line of low water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Ebey's Slough to the place of beginning.

IV.

That in accordance with the terms of said treaty,

the title to all of said property, except such as has been severally patented to individualy Indians, has been and now remains in the United States of America in trust for those Indians, for whose benefit it was so set aside as provided in said treaties.

V.

That a portion of the southeast boundary of said reservation, to wit, a portion of a line drawn from the point where the township line between townships 30 and 31 intersects the low-water mark on the shore of Port Susan. [3] and running thence "southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner with all the meanders thereof, and across the mouth of Ebey's Slough to the place of beginning," was and is a line running easterly from the southern most point of lot four (4) of section one (1), township twenty-nine (29) north, range four (4) east, W. M., to the point on the low-water mark of Steamboat Slough, where the section line between sections thirty-two (32) and thirty-three (33) of township thirty (30) north, range five (5) east, W. M., intersects said low-water mark, said last mentioned point being the place of beginning for said reservation as aforesaid; that said line so last described as a part of the southeastern boundary of said reservation is and at all times herein mentioned was that portion of said southeastern boundary which crosses the mouth of Ebey's Slough according to the calls in said executive order so setting apart said reservation,

VI.

That lying in the mouth of Ebey Slough and im-

mediately north of said line last described as being that portion of the southeastern boundary of said reservation which crosses the mouth of Ebey Slough, there has grown up since the date of said executive order certain tide and mud and sand flats, which are thus within said reservation, and have never been patented to any individual or corporation, and the title to which is in the United States of America in trust for said Indians as aforesaid, and free of all other claims, titles or interests whatsoever. [4]

VII.

That the defendants, Snohomish River Boom Company, a corporation, and Everett Improvement Company, a corporation, claim to have some right, title or interest in and to said mud, tide or sand flats, referred to in the last preceding paragraph, adverse and hostile to the United States of America, and the nature of which is to plaintiff unknown, but which plaintiff alleges to be of no force and effect and invalid as opposed to the claims of plaintiff.

VIII.

That on or about September 13, 1911, the defendant, Snohomish River Boom Company, as an alleged tenant of the defendant, Everett Improvement Company, which last named defendant had itself no right, title or interest therein, and not acting under any authority from the United States of America, went into possession of a portion of such tide land or mud bar so lying in the mouth of Ebey Slough and in said reservation and north of said portion of said southeasterly boundary thereof, and has so continued, and is still in said possession, and each of said defendants

refuses to give up said possession to plaintiff, or to recognize the right of plaintiff therein.

IX.

That the portion of said tide lands or mud flats in the mouth of Ebey Slough, and north and the southeastern boundary of said reservation, and within said reservation, possession of which is so adversely held by defendants, is an irregular shaped tract of the general form of a triangle, having its southerly base commencing about one-half mile east, about fifteen (15) degrees north of the southern most [5] point of lot four (4), section one (1), township twenty-nine (29) north, range four (4) east, and running thence north, about 80 degrees east a distance of about 7,736 feet; the westerly leg of said triangle being an irregular line extending about 1,000 feet westerly of its southern beginning point and ending at a point about 900 feet east and about 2,250 feet north of said southerly beginning point; that a more exact description of said tract is to plaintiff unknown, but that all of said tract lies north of said southeastern boundary of said reservation and within said reservation, and has never been patented to any individual or corporation; that the reasonable rental value of said tract is five hundred dollars (\$500.00) per year.

WHEREFORE plaintiff prays for a judgment against the defendants, and each of them, that as holder of the legal title thereof it be placed in the immediate possession of said real estate so lying north of the southeastern boundary of said reservation, and now in the adverse possession of the said

defendants, and for judgment in the sum of one thousand dollars (\$1,000.00) against the defendants, and each of them, and for its costs and disbursements herein.

C. F. RIDDELL,
United States Attorney.

E. B. BROCKWAY,
Assistant United States Attorney.

United States of America,
Western District of Washington,—ss.

E. B. Brockway, being first duly sworn, on oath deposes and says:

I am Assistant United States Attorney and make this verification in that capacity; I have read the foregoing complaint, know the contents thereof, and believe the same to be true.

E. B. BROCKWAY. [6]

Subscribed and sworn to before me this 3d day of May, 1913.

[Seal]

E. M. LAKIN.

[Endorsed]: Complaint. Filed in the U. S. District Court, Western Dist. of Washington. May 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [7]

UNITED STATES OF AMERICA.

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Cor-
poration, and EVERETT IMPROVEMENT
COMPANY, a Corporaton,

Defendants.

Summons.

The President of the United States of America,
Greeting: To the Above-named Defendants,
Snohomish River Boom Company, a Corpora-
tion, and Everett Improvement Company, a Cor-
poration.

You are hereby required to appear in the United States District Court, in and for the Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above-named plaintiff, now on file in the office of the Clerk of said Court, in the City of Seattle, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

WITNESS, the Hon. EDWARD E. CUSHMAN,
Judge of said Court, this 3d day of May, in the year
of our Lord one thousand nine hundred and thirteen
and of our independence the one hundred and thirty-
seventh.

[Seal]

FRANK L. CROSBY,
Clerk.

By Ed M. Lakin,
Deputy Clerk. [8]

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the an-
nexed Summons together with the complaint on the
therein named Snohomish River Boom Company, by
handing to and leaving a true and correct copy
thereof with W. L. McCormick, vice-president of the
said Snohomish River Boom Company, personally,
at Tacoma, in said District, on the 15th day of May,
A. D. 1913.

JOSEPH R. H. JACOBY,
U. S. Marshal.

By Fred M. Lathe,
Deputy.

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the
within Summons, together with copy of complaint,
on the therein named Everett Improvement Com-
pany, by handing to and leaving a true and correct

copy thereof with E. C. Mony, secretary of the within named Everett Improvement Company, personally, at Everett, in said District, on the 12th day of May, A. D. 1913.

JOSEPH R. H. JACOBY,
U. S. Marshal.
By Fred M. Lathe,
Deputy.

Marshal's fees: \$3.98.

[Endorsed]: Summons. Filed in the U. S. District Court, Western District of Washington. May 16, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy. [9]

*In the District Court of the United States, for the
Western District of Washington, Northern
Division.*

No. 2469.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation, and EVERETT IMPROVEMENT COMPANY, a Corporation,
Defendants.

Answer.

The defendants answer the complaint as follows:

I.

They and each of them deny each and every allegation contained in paragraphs V and VI of said complaint.

II.

Answering paragraph VII of the complaint, they and each of them deny that they or either of them claim any right, title or interest in or to any of the land or property described in paragraph III of the complaint, but they admit that they do claim and assert that they do have some right, title and interest in and to the property lying north of the alleged boundary described in paragraph V of the complaint, which property is more particularly described in paragraph IX of said complaint.

III.

The defendants admit that on or about September 13, 1911, the defendant, Snohomish River Boom Company, as a tenant of the defendant, Everett Improvement Company, went into possession, and has continued and still is in possession of the property described in paragraph IX of the complaint; but these defendants deny each and every other allegation contained in paragraph VIII of said complaint, and they assert that the property of which they are in [10] possession, and which they claim to own is not included and described in paragraph III of the complaint, and the defendants, and each of them, deny that the tide-lands or mud flats undertaken to be described in paragraph IX of said complaint are in the mouth of Ebey Slough, or that they are north of the southeastern boundary of the Indian Reservation referred to in the complaint, and deny that they are within the boundaries of said Indian Reservation; but admit that they are north of the southeastern boundary of said reservation, as the same is al-

leged to be in paragraph V of said complaint, and they deny each and every other allegation contained in paragraph IX of said complaint.

IV.

The defendants and each of them aver that the southeastern boundary of said reservation is not as the same is alleged to be in paragraph V of said complaint, but that that portion of said southeastern boundary of said reservation was and is a line running southeasterly from the most easterly point of lot five (5), section thirty-one (31), township thirty (30) north of range five (5) east, southeasterly across the mouth of Ebey Slough to the point on the low-water mark of Steamboat Slough, where the section line between sections thirty-two (32) and thirty-three (33) of township thirty (30), north of range five (5) east, W. M., intersects said low-water mark.

And for a further and affirmative defense, these defendants allege: [11]

I.

That at the time of the admission of the State of Washington into the Union, the tide lands, mud flats and property involved in this litigation were situated under the tide waters and within the limits of said State, and thereupon became the property of said State, and that on the 4th day of February, 1893, the said State of Washington, for a valuable consideration, and pursuant to the laws of said State, granted and conveyed to the Everett Land Company, a corporation, the following described tide lands, situated in Snohomish County, State of Washington, to wit,

Beginning at the meander corner common to fractional sections 5 and 6 on south side of Smith's Island in township 29, north of range 5 east of the Willamette Meridian; thence following the Government meander line south 54 deg. east, 231 feet; thence south 63 deg. east, 976.8 feet to meander corner common to fractional sections 5 and 8 in said township and range; thence south 78 deg. east, 462 feet; thence south 88 deg. east, 594 feet; thence south 70 deg. east, 462 feet; thence south 76 deg. east, 541.2 feet; thence south 74 deg. east, 462 feet; thence south 63 deg. east, 726 feet; thence south 80 deg. east, 627 feet; thence south 25 deg. east, 1181.4 feet to meander corner common to fractional sections 8 and 9 in township and range aforesaid; and thence leaving Government meander line, south 0 deg. 30' west, 100 feet; thence north 53 deg. 50' west, 2660 feet; thence north 74 deg. 47' west, 1076.4 feet; thence south 83 deg. west, 2130. 5 feet; thence north 71 deg. 22' west, 6550 feet; thence north 51 deg. 16' east, 2089 feet; thence north 4 deg. 11' east, 1142 feet; thence north 20 deg. 31' west, 1170 feet; thence north 51 deg. 45' east, 994 feet; thence south 69 deg. 28' east, 4990 feet; thence north 83 deg. 03' east, 3105 feet; thence south 64 deg. 20' east, 1827 feet; thence south 0 deg. 40' east, 290 feet to meander corner common to fractional sections 4 and 5 in township and range aforesaid; thence following the Government meander line north 65 deg. west, 356.4 feet; thence north 68 deg. west, 363 feet;

thence north 70 deg. west, 303.6 feet; thence north 76 deg. west, 330 feet; thence north 83 deg. west, 204.6 feet; thence north 81 deg. west, 240.9 feet; thence south 88 deg. west, 627 feet; thence south 78 deg. west, 627 feet; thence south 79 deg. west, 297 feet; thence south 73 deg. west, 594 feet; thence south 85 deg. west, 442.2 feet; thence south 76 deg. west, 297 feet; thence south 66 deg. west, 838.2 feet to meander corner common to fractional sections 5 and 6 in township and range aforesaid on north side of Smith's Island; thence south 62 deg. west, 594 feet; thence south 61 deg. west, 396 feet; thence south 28 deg. west, 429 feet; thence south 15 deg. east, 429 feet; thence south, 30 deg. east, 726 feet; thence south 58 deg. east, 699.6 feet to point of beginning, containing 626.4 acres; [12]

—that included in the description last aforesaid are the tide lands and mud flats sought to be recovered by the plaintiff in this action.

II.

That the defendant, Everett Improvement Company, by several mesne conveyances, from the said Everett Land Company, became and now is the absolute owner of the property described in the last preceding paragraph, and that it has leased a portion of said lands to the defendant, the Snohomish River Boom Company.

Wherefore, these defendants pray that the plaintiff take nothing by this action, but that the defendant, Everett Improvement Company, have its title to the land involved in this litigation, quieted as

against any claim of the plaintiff, and that these defendants have and recover of and from the plaintiff herein, their costs and disbursements incurred in this action.

FRANCIS H. BROWNELL,
J. A. COLEMAN,
Attorneys for Defendants.

State of Washington,
County of Snohomish,—ss.

E. C. Mony, being first duly sworn on his oath, says: That he is the Secretary of the defendant, Everett Improvement Company, a corporation; that he makes this verification for and on behalf of said defendant; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

[Seal]

EDWARD C. MONY.

Subscribed and sworn to before me this 28th day of May, 1913.

J. M. HOGAN,
Notary Public in and for the State of Washington,
Residing at Everett. [13]

Copy of the within answer received, and due service thereof acknowledged, this 29th day of May, 1913.

C. F. RIDDELL,
U. S. Attorney.
E. B. BROCKWAY,
Asst. U. S. Atty.

[Endorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington. May 29, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [14]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corpo-
ation, and EVERETT IMPROVEMENT
COMPANY, a Corporation,

Defendants.

Memorandum Decision.

Filed May 10, 1916.

ON MOTION TO DISMISS—MOTION GRANTED.

CLAY ALLEN, U. S. Attorney, WINTER S. MAR-
TIN, Asst. U. S. Attorney, for Government.

J. A. COLEMAN, FRANCIS H. BROWNELL, of
Everett, Wash., for Defendants.

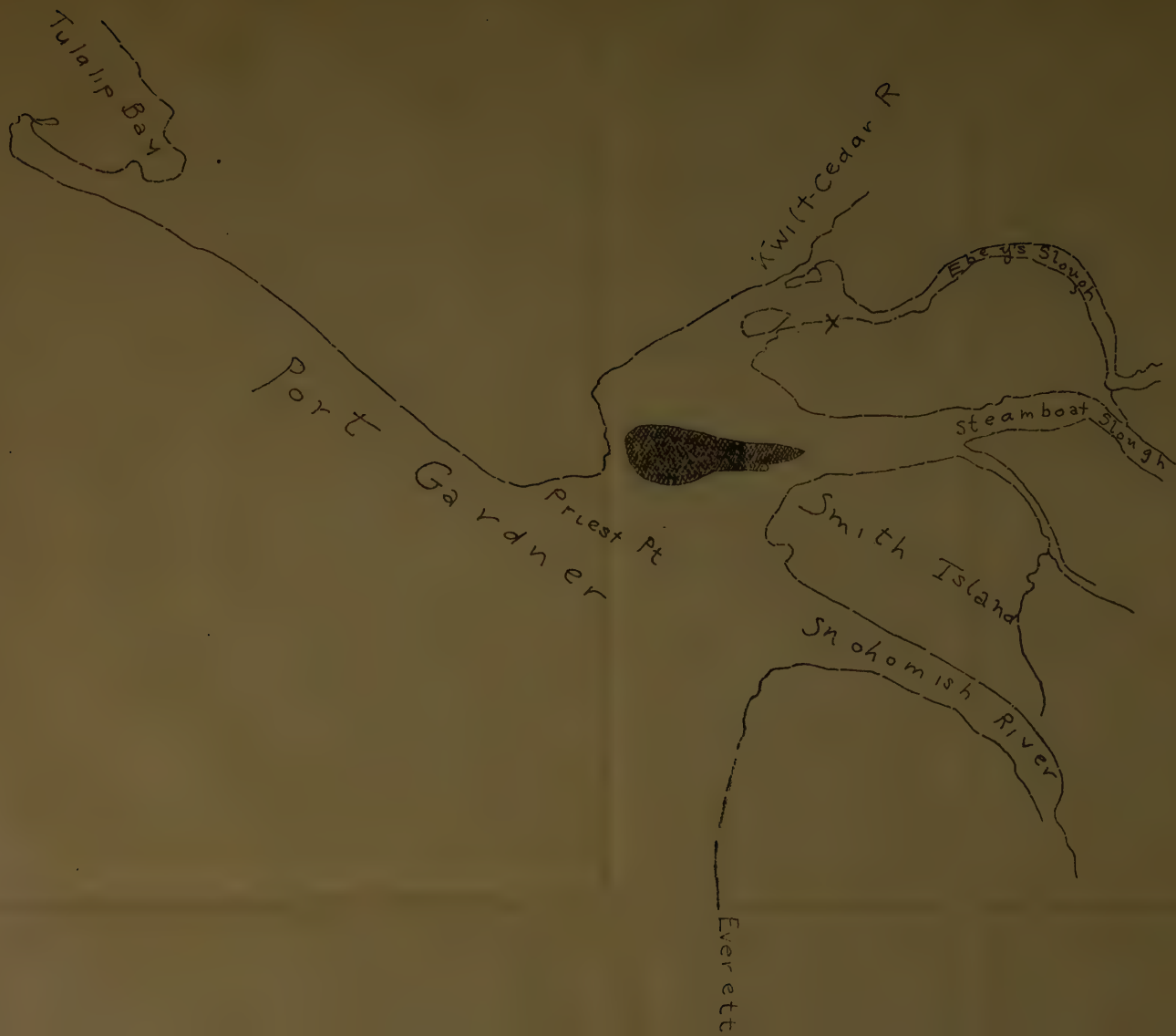
NETERER District Judge:

The United States seeks to recover from the defendants the possession of certain tide-lands situated at Port Gardner, Snohomish County, Washington. The land was sold by the State of Washington to the Everett Improvement Company as tide-lands, and was by the Improvement Company leased to the Boom Company. The issue involves the construction of executive order of December 23, 1873, and the Indian treaty of 1855. Section 2 of the treaty provides, among other things, "that the amount of two sections of 1280 acres, on the north side of Hwohwhomish and the crick emptying into the same called the

Kwilt-Cedar, the peninsula at the southeastern end of Perry Island * * * all of which tract shall be set apart and so far as necessary surveyed and marked out for their exclusive use * * * ,” and further that [15] “there is also reserved throughout the lands hereby ceded the amount of thirty-six sections of one township of land on the northeastern shore of Port Gardner and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-Cedar crick * * * ,” and Article 4, “The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them * * * .” Article 5, “The right of taking fish at usual and accustomed grounds and stations is further secured to the Indians * * * .”

President Grant, December 23, 1873, by executive order, fixed the boundaries of the Tulalip Indian Reservation pursuant to the treaty, as follows: “Beginning at low water mark on the north shore of Steamboat Slough at a point where the section line between sections thirty-two and thirty-three of township twenty north, range five east, intersects the same; thence north * * * thence west * * * to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore to the shores of Tulalip Bay and Port Gardner with all the meanderings thereof, and across the mouth of Ebey’s Slough to the place of beginning. The following sketch exhibits the land:

[16]



It is contended by the plaintiff that the meander line along the shore should extend from the most southerly point of the reservation (Priest Point) across the channel to Steamboat Slough, which would include the wedge-shaped tide-lands colored black on the sketch; whereas, the defendants contend that the boundary follows low-water mark along the channel to the mouth of Ebey's Slough, which, it is contended, is above the lands in question, and thence to the point of beginning. At the conclusion of the evidence defendant moved to dismiss.

According to the meander notes U. S. Government, the mouth of Ebey's Slough is practically at X indicated upon the sketch. The testimony shows that the land in question is a part of the tide-lands which extend from and adhere to Smith Island; that these lands are separated by a deep-water channel on the west and north and are independent of the reservation; that Steamboat Slough, which is navigable, is north of the land, and the water of Port Gardner is west and form a navigable channel between the reservation and the land in question entering into Ebey's Slough. I think it must be apparent from an examination of the treaty and likewise of the executive order, that the purpose was to grant to the Indians tillable land with such accretions as would naturally belong thereto. I do not think that it could have been the intention of the executive order to have included tide-lands which were entirely separated and segregated from the uplands of the reservation. If it had been the intention to grant any special water privileges across the navigable water

upon which the reservation borders, fitting language would have been employed. A casual [18] reading of the executive order, together with a consideration of the mouth of Ebey Slough as fixed by the United States Government notes, however, is conclusive upon the plaintiff. The mere fact that the executive order in general terms, reads, 'southeasterly' with the line of low-water mark along said shore * * * of and across the mouth of Ebey Slough to the place of beginning" cannot be read to extend across the waters of Port Gardner, but must be carried to the mouth of Ebey Slough, even though the course may not be directly southeasterly to the point of commencement.

The motion to dismiss is granted.

JEREMIAH NETERER,

Judge.

[Endorsed]: Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 10, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [19]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corpo-
ration, and EVERETT IMPROVEMENT
COMPANY, a Corporation,

Defendants.

Judgment.

This cause came on regularly for trial on the 9th day of May, A. D. 1916, before the Honorable JEREMIAH NETERER, the Judge of the above-entitled court; the plaintiff appearing by its attorney Winter S. Martin, the Assistant United States Attorney for said District, and the defendants appearing by their attorney J. A. Coleman; and the plaintiff on the one hand and the defendants on the other hand having made certain stipulations as to the facts involved herein, and evidence having been adduced, and at the conclusion of the case the defendants moved for a dismissal thereof, upon the ground that it did not appear from the record herein that plaintiff is entitled to the possession of the property in controversy, but that on the other hand that it did appear from such record that the defendant Everett Improvement Company is the owner, and that it and

its tenant the Snohomish River Boom Company are entitled to the possession thereof. The Court after argument took said motion under advisement, and on the 10th day of May, A. D. 1916, rendered and filed a decision sustaining the contention of the defendants upon said motion; and now being in all things fully advised in the premises; it is considered, ordered and adjudged, that this cause be and the same is hereby dismissed. [20]

Dated this 15th day of May, A. D. 1916.

JEREMIAH NETERER,

Judge.

O. K.—WINTER S. MARTIN,

Asst. U. S. Atty.

[Endorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 15, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation,
and EVERETT IMPROVEMENT
COMPANY, a Corporation,

Defendants.

**Stipulation Extending Time for Preparing, etc., Bill
of Exceptions.**

The parties in the above-entitled cause by and through their respective counsel stipulate as follows, to wit: That the May term of the United States District Court for the Western District of Washington, Northern Division, A. D. 1916, may be extended by the court until and unto the 1st day of December, A. D. 1916, for the purposes of settling, allowing and filing a bill of exceptions in the above-entitled cause and that plaintiff be given the additional time mentioned, to wit, from the date hereof up to and including the 1st day of December, A. D. 1916, for the purpose of preparing, allowing, settling and filing its said bill of exceptions.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 2d day of November, 1916.

CLAY ALLEN and
WINTER S. MARTIN,
Attorneys for Plaintiff.
J. A. COLEMAN,
Attorney for Defendants.

[Endorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 2, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [22]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Cor-
poration, and EVERETT IMPROVEMENT
COMPANY, a Corporation,

Defendants.

**Order Extending Time to Prepare, etc., Bill of
Exceptions.**

This cause having come on to be heard upon the oral application of the United States Attorney for an order extending the May term of the United States District Court for the Western District of Washington, Northern Division, for the purposes of filing a bill of exceptions upon the stipulation of counsel in said cause, and the Court being duly advised, it is by the Court

Ordered and decreed that the May term, A. D. 1916, of the United States District Court for the Western District of Washington, Northern Division, be, and the same is, hereby extended up to and including the 1st day of December, 1916, in order to permit the plaintiff in the above-entitled cause to prepare, file, present and have allowed its bill of exceptions in said cause, and the plaintiff be, and it hereby is, given until the said 1st day of December, 1916, from the date hereof to prepare, file, present

and allow its said bill of exceptions in said cause.

Done in open court this 2d day of November, 1916.

EDWARD E. CUSHMAN,

United States District Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western District of Washington, Northern Division, Nov. 2, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [23]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation, and EVERETT IMPROVEMENT COMPANY, a Corporation,

Defendants.

**Order Further Extending May Term, 1916, of the
District Court.**

This cause coming on to be heard upon the motion and affidavit of Winter S. Martin, Assistant United States Attorney for the Western District of Washington, for an order extending the May term, 1916, of the above-entitled court for purposes of preparing, presenting, filing and having allowed plaintiff's bill of exceptions in said cause, and the Court being duly advised in the premises,

IT IS BY THE COURT ORDERED AND DECREED that the May term A. D. 1916, of the above-

entitled court be and the same hereby is extended from December 1, A. D. 1916, to and including January 15, A. D. 1917, and the time within which counsel for the plaintiff and plaintiff in error in the said cause may prepare, present, file and have its bill of exceptions allowed in said cause be, and the same hereby is, extended from said December 1, 1916, to and including January 15, 1917, all for the purpose of prosecuting plaintiff's writ of error in said cause.

Done in open court this 24th day of November, A. D. 1916.

JEREMIAH NETERER,
United States District Judge. [24]

[Endorsed]: Order Further Extending May Term, 1916, of the District Court. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 24, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [25]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation, and EVERETT IMPROVEMENT COMPANY, a Corporation,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the ninth day of

May, 1916, the above-entitled cause duly came on for trial before the Honorable JEREMIAH NETERER, Judge of the above-entitled court, jury having been waived by both parties. That upon said trial Messrs. Clay Allen, United States Attorney, and Winter S. Martin, Assistant United States Attorney, appeared for the plaintiff, and J. A. Coleman of Everett, Washington, appeared for the defendants. Thereupon the following proceedings were had: [26]

Mr. MARTIN.—This case, if your Honor please, is an action at law in which a jury trial was waived by both parties. The cause of action is one in ejectment to recover a certain triangular strip of land at the entrance to a certain body of water on the salt water of the Sound, known as Ebey Slough, on the Tulalip Indian Reservation in this State. The complaint is brought against two defendants, the Snohomish River Boom Company, a corporation, and the Everett Improvement Company, a corporation. The corporate capacity of the two defendants is admitted. The complainant seeks to recover this triangular strip of land, setting it out by metes and bounds, and the facts upon which the recovery is based are about as follows: In 1855 there was a treaty, between the Indians and the white people at White Elliott known as the treaty of White Elliott, and the general purpose of that treaty was for the Indians to relinquish the lands in and about Puget Sound and to reserve to themselves certain tracts of land to their own use and to remain away from the whites, and the only language in the treaty which refers to

this reservation is as follows: In Article 3 they say, "There is also reserved from out of the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeast shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the aforementioned Quilceda Creek."

That is the only language referring to the establishment of the Indian Reservation in and around Tulalip Bay a full township of thirty-six sections, generally [27] at the mouth of the Snohomish River, including Tulalip Bay and Quilceda Creek.

Following that proclamation, the President in December, 1873,—and these dates are material because there was a survey made before that,—in December, 1873, President Grant, by Presidential proclamation, in general language set aside this reservation which was made in the treaty, the language of which is, "It is hereby ordered that the boundaries of the Tulalip Indian Reservation, provided for in the third article of the treaty, shall be as follows: 'Beginning at low-water mark on the north shore of Steamboat Slough at a point where the section line between sections 32 and 33 of township 20 north, range 5 east, intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5, to the township line between townships 30 and 31; thence west on said township line to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the mean-

ders thereof, and across the mouth of Ebey Slough to the place of beginning.' ”

And the whole controversy rests upon the proper construction of this Presidential proclamation. It says, “Beginning at low-water mark on Steamboat Slough.” I have drawn a rough diagram so your Honor may follow me. Steamboat Slough is about at the edge of this (indicating on the diagram). Beginning at this point, at low-water mark on Steamboat Slough,—I will read [28] the description again and your Honor can follow me.

By a map that we will introduce it will be approximately there. That is north on the line between 20 and 21.

The COURT.—Those little squares you have, I presume, are 40-acre tracts.

Mr. MARTIN.—I have just run these to show the allotments. There is the low-water mark there. And that would be the north line of the Indian Reservation which goes out to the low-water mark at Port Susan. “Thence southeasterly with the line of low-water mark along the said shore line and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Ebey Slough to the place of beginning.”

And the controversy arises from the construction of the language, of the words, “across the mouth of Ebey Slough to the place of beginning.” The controversy is whether or not that line that follows Tulalip Bay and around the shores at low-water mark should be considered as going out into the Slough to approximately the point of the pointer here (indi-

eating), and then across the mouth at that point and down there, or whether the mouth would be broadly considered as containing a greater area so that the line may be said to run from this point here across the mouth of Ebey Slough to the point of beginning in a straight line. Now, I am not fully advised as to the area or acreage in that space, but there has grown up, and I believe there is constantly growing, certain tide lands which are slowly emerging from the water, and they have so emerged [29] so that a few years ago there was a triangular piece of land which should be inside of the line which we claim for the Reservation, our contention and theory being that the line of the Reservation follows the sinuosities of the shore and around to the mouth of Union Slough, and that that was the mouth, and then across there to the point of beginning; and the defendant contends that the line is up there, about where I have the pointer.

The defendant Snohomish River Boom Company bought certain tide lands from the State of Washington, a portion of which would lie within the line which we claim as the line of the Reservation, and the defendant Everett Improvement Company bought the land, that is right, is it not?

Mr. COLEMAN.—That is the predecessor in interest.

Mr. MARTIN.—The Snohomish River Boom Company bought the land and the Everett Improvement Company succeeded them in interest and then leased it so that one of them has a lease on it and the other owns it and they are both made parties defend-

ant. The area chalked in green is simply to represent approximately the tide land grant to the Everett Improvement Company which lies outside of the line of the Reservation. By metes and bounds there will be quite an area that is not in dispute, but a portion of the tide land granted by the State of Washington to the predecessor of the Everett Improvement Company and now owned by the Everett Improvement Company, and leased to the Boom Company, lies inside of what we claim to be the line of the Reservation.

Now those are the disputed facts and this action [30] is brought in ejectment to recover by metes and bounds that particular piece of land which lies inside that line. I have suggested to counsel, and I make the same suggestion to the Court, that while it is desirable in this action to recover the particular triangular strip of land in this controversy, if the Government is entitled to recover it, we would like if possible to have the further decree establishing that line as the south line of the reservation, and that of course raises the question of whether or not this court sitting as a law court of the United States would give us equitable relief in a law action, or whether another action would have to be brought if any action arose. As it now stands it is an action to recover that particular strip of land in ejectment, and I don't think there are any other parties interested in that strip, so that the judgment would be conclusive without any additional relief being sought. You would take that view, would you not?

Mr. COLEMAN.—I don't know if any others are

interested. I think it would be an entire change of the cause of action.

The COURT.—I think so, too.

Mr. MARTIN.—There is a stipulation, the parties have agreed, and there is only one portion of the stipulation in the language as drawn which we cannot agree upon. I thought this would be signed up, but there is some slight discrepancy. The first paragraph is—

The COURT.—Read the stipulation that you stipulate upon. I am not concerned with what you disagree upon. [31]

Mr. MARTIN.—The first paragraph is:

“That the plaintiff herein is the United States of America; that the defendants, Snohomish River Boom Company, is a corporation, duly organized and doing business under the laws of the State of Washington, and that the defendant, Everett Improvement Company, is a corporation, duly organized and doing business under the laws of the State of Washington.”

The second paragraph is: “The Court shall take into consideration as evidence and for all of the purposes of this suit, all treaties between the United States and any Indian tribe or tribes in so far as the same may be deemed material or relevant, and particularly, the treaty with the Duwamish and other tribes of Indians, of January 22, 1855.”

And the third paragraph is: “That on or about December 23, 1873, U. S. Grant, the then president of the United States, by an executive order, defined

and described the boundaries of the Tulalip Indian Reservation as follows:

‘Beginning at low-water mark on the north shore of Steamboat Slough at a point where the section line between sections 32 and 33 of township 30 north, range 5 east, intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5 to the township line between townships 30 and 31; thence west on said township line to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth [32] Ebey’s Slough, to the place of beginning’;

—and that at the time of making said executive order, none of said land had theretofore been patented or conveyed by the United States to any one.”

Now in paragraph four here is the stipulation as drawn, that pursuant—

The COURT.—Is that the stipulation agreed upon?

Mr. MARTIN.—Paragraph four, we will agree upon in substance.

The COURT.—I am not concerned with what you do not agree upon.

Mr. MARTIN.—Your Honor will see what we mean by this paragraph. The paragraph as drawn is: “That pursuant to the laws of the United States, and by direction of its proper officers, the surveyor-general of the Territory of Washington, after the

making of the executive order aforesaid made a survey of the exterior lines of said reservation, as well as of the interior lines thereof, and made a map of said reservation; all of which was subsequently approved by the proper officials of the United States, and that a copy of the field-notes of said survey, in so far as they affect the southeastern boundary of said reservation, are hereto attached, marked exhibit 'A' and are hereby referred to, and by such reference made a part hereof; and that a copy of said map is hereto attached, marked exhibit 'B,' and is hereby referred to, and by such reference made a part hereof, and that said field-notes are platted on exhibit 'C' hereto attached; which last named exhibit also shows the land conveyed by the State of Washington to the Everett Land Company and the tract in dispute [33] herein."

Now, we expect by witnesses to show that this order was made in December, 1873. That in August of that year the contract was let for this survey and the actual work commenced, and that it proceeded from time to time to establish these several lines until the survey of these lines around Ebey Slough was concluded sometime in the following May, but it is not literally true, as stated, that after the making of the executive order as aforesaid the Government made a survey of the aforesaid lines, because it was commenced before the proclamation was made, "and made a map of said reservation; all of which was subsequently approved by the proper officials of the United States." It is true a map was made and it is literally a map of the reservation, but some of the

boundaries do not, as I purpose to show, follow the language of the actual boundaries of the Presidential proclamation. "And that a copy of the field-notes are hereby attached and marked exhibit 'A,' and that a copy of said map is attached and marked exhibit 'B.' "

I thought that in going over the map with Mr. Coleman that the field-notes, of which we have a duly exemplified copy of the lines in and around Ebey Slough, that these field-notes were part of this survey, and that this survey was literally made upon the executive order and that by further departmental order the survey was made to conform to the proclamation, but that we find is not the fact. The Government in this particular expects to show by the surveyor-general of the United States that the only map of the reservation, the only [34] survey which was made down to 1902 or 1903, ran out to that point on Port Susan, at the point of high-water mark, and that there was being surveyed a meander line, and following the sinuosities of the shore, which meander line had the effect of following the upland portion of the Reservation, and may be treated as such, and that these meanders follow around in Ebey Slough to where the actual east line of the Reservation is, and that we have a map platted of the field-notes of that meander line, but those field-notes are the field-notes of the meander line which do not conform to the Reservation line itself, and we expect to show that that line never did attempt to establish the line of the Reservation out on the line of low-water, and upon that admission I think all the facts are be-

fore the Court and the Court will understand the relative value of these field-notes and the draft which was made. This plat I have here, there is the actual line in question (indicating on the diagram), and that triangular strip of land is what we claim lies within the Reservation line. If the Reservation line is construed to mean down to that point, I don't know the section number, but where I have my finger, and thence directly across, or whether it follows the sinuosities of the shore, I don't know. But with that explanation we can admit that these field-notes which we have are the actual field-notes of the meander which was made at the time, and that they have the purpose of showing the boundaries of the Reservation to the high water mark, but not to the line of low-water mark, which is the language of the Presidential proclamation, and we will admit the facts [35] shown by the field-notes as to the area in question. I should suggest here that the defendants assert their title to the land in question based upon the deed from the State of Washington claiming that the same was free from any act of the United States. Paragraph five reads:

“That the property described in paragraph I of the affirmative defense set forth in the answer of the defendants, was on February 4, 1893, deeded by the State of Washington, to the Everett Land Company, and later on, by the Everett Land Company, by mesne conveyance to the defendant, Everett Improvement Company, and that the said Everett Improvement Company has leased a portion thereof to the defendant, the Snohomish River Boom Com-

pany; that the United States has never patented or undertaken to convey to anyone, any portion of said lands, but the sole claim of the plaintiff herein is that a portion of said lands lies within the boundaries of the Tulalip Indian Reservation; that said lands constitute a tide flat, which is daily covered and uncovered by the ebb and flow of the tide, and that there is and at all times has been a deep water channel sufficient for the passage of steam boats and other water craft, lying between said tide flat and the main or upland of said Indian Reservation." It is true and it is admitted that there is a deep water channel following the line of the shore, and the channel of Ebey Slough goes around in that slough and I think there is some channel in there, isn't there, Mr. Coleman?

Mr. COLEMAN.—No, the channel follows the other line.

The COURT.—How deep is that channel? [36]

Mr. COLEMAN.—It is deep enough for any steamboat that goes up the Snohomish River.

Mr. MARTIN.—As to that part that goes over near Steamboat Slough there is a small channel in there, is there, Mr. Coleman?

Mr. COLEMAN.—Steamboat Slough is to the right.

Mr. MARTIN.—Is there any channel in Ebey Slough?

Mr. COLEMAN.—No, there is no channel. They both empty into Port Gardner Bay. I will show you another map later. [37]

Testimony of E. A. Fitz-Henry, for the Government.

E. A. FITZ-HENRY, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. MARTIN.)

Q. Mr. Fitz-Henry, you are the Surveyor-General of the United States for the State of Washington?

A. Yes, sir.

Q. Mr. Fitz-Henry, what is your profession?

A. Civil engineer and surveyor.

Q. How long have you been acting as such and practicing your profession?

A. Twenty-six years.

Q. You were formerly located at Port Angeles before your connection with the Government?

A. Yes, sir.

Q. Mr. Fitz-Henry, you are the custodian of the records of the public land surveys of the State of Washington, are you not? A. Yes, sir.

Q. And your office is located at Olympia?

A. Yes, sir.

Q. Have you brought the records which relate to the Tulalip Indian Reservation?

A. Yes, I brought all the official records.

Q. Now, will you turn to the maps and books you brought with you Mr. Fitz-Henry, and tell us when the first survey was made of the Tulalip Indian Reservation.

A. I will have to refer to the records.

(Testimony of E. A. Fitz-Henry.)

Q. Yes, as shown by your records. [38]

A. The records are dated according to each day's work in the field, and of course they will cover a period of several months. Now, any particular portion of the field-notes that you want?

Q. Well, when was the survey work first commenced? A. The 6th day of August, 1873.

Q. And continued until when approximately?

A. May 22, 1874.

Q. Do you know and have you examined the records to ascertain whether this survey which was actually made followed the call of the Presidential proclamation establishing the Reservation?

A. The east and north boundary was surveyed and monumented according to the proclamation, but that portion of the boundary line bordering on the Sound or the salt water was never monumented. The meander line was surveyed along mean high-water line for the purpose of ascertaining the area of the fractional lots bordering on the salt water.

Q. Have you a map of the Reservation, showing the surveys? A. Yes, I have three maps here.

Q. First give me the official map of the Reservation, the complete map. A. Yes, this is it.

Q. See if those two maps are the same.

A. Yes, one is an exemplified copy of the original. This is the original, and this is an exemplified copy.

Mr. MARTIN.—We will offer the exemplified copy of the original as Plaintiff's Exhibit No. 1.

Mr. COLEMAN.—I think there is a mark on that

(Testimony of E. A. Fitz-Henry.)

where we were [39] going to attach it to the stipulation.

Mr. MARTIN.—Yes; that should be stricken out.

(Map is admitted in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (Mr. MARTIN.) Now, what other maps have you?

A. I have a supplemental map showing the Indian allotments, a portion of the north and east boundary, and the meander of the mean high tide along the beach.

Q. When was that map made?

A. This was made June 24th, 1874, and then I have a supplemental map showing the boundaries of the Indian Agency and the land attached to the agency.

Q. And when was that one made?

A. It was surveyed in December, 1902, and surveyed by H. V. Kingsbury, surveyor-general, April 1st, 1904.

Q. Now, referring to the survey of 1874, does that in any way attempt to locate the south and west line of the Reservation along salt water?

A. No, sir. That survey, according to the proclamation, or the boundary line according to the proclamation, was never made or attempted to be made. The only survey along the water front was made to determine the area of the fractional lots.

Q. And this survey relates entirely to the upland portion of the Reservation inside of the line.

A. Yes, sir.

Q. And to mark out the Indian allotments.

(Testimony of E. A. Fitz-Henry.)

A. Yes, sir.

Q. And the survey of 1903 and 1904, you refer to the lines of the Reservation there.

A. That refers to the agency on Tulalip Bay and the north [40] and east boundary which was monumented. There has never been any attempt on the part of the Government to monument the boundary along the water front.

Q. So that the surveys of 1903 and 1904 re-set, and re-establish the east and north line of the Reservation. A. Yes, sir.

Q. And no effort was made to outline the land below the high-water mark or to change the meander line originally made? A. No, sir.

Mr. COLEMAN.—These do not vary the original map in any way? A. No, sir.

Mr. COLEMAN.—I think they are immaterial.

Mr. MARTIN.—Q. Mr. Fitz-Henry, have there been any other surveys excepting the three you have testified to?

A. No, those are the only surveys that have been made. That is what my office records show.

Q. And in the surveys thus made only one of them, the original survey, had anything to do with the meander line.

A. The original survey surveyed the meanders of the mean high-water line along the waterfront.

Q. How do you explain the fact that the meander line of the first survey followed the sinuosities of the shore of Ebey Slough away up inside the mouth and beyond the mouth?

(Testimony of E. A. Fitz-Henry.)

A. That meander line was run to determine the area of the upland portion of the Reservation and to separate the water survey from the land survey.

Q. And without regard to the actual call of the Reservation. A. No, sir. [41]

Q. Mr. Fitz-Henry, where would the line in your judgment, following the call of the Reservation, where would that line be?

Mr. COLEMAN.—We object to that as calling for a conclusion.

The COURT.—I don't see that that can help you any.

Mr. MARTIN.—Well, that is a matter of law. I think it is proper for an expert to give his opinion as to where the line of the Reservation would be, following the call.

The COURT.—Do you mean the line at low-water mark?

Mr. MARTIN.—Where the line of the Reservation would be. It has never been put in.

The COURT.—He may state where he believes the line of low-water mark would be.

Q. (Mr. MARTIN.) Just outline it, Mr. Fitz-Henry.

A. It would be impossible to follow the survey all the way around here. To determine the low-water line would require a system of soundings and markings by buoys. You would have to survey along the high-water line. Otherwise it would take a year or more to determine that and mark it at low-water, so there has been no attempt on the part of the Govern-

(Testimony of E. A. Fitz-Henry.)

ment to monument the low-water line.

Q. And is that true generally of the public land surveys in your jurisdiction?

A. In the public land surveys within my jurisdiction we only attempt to survey the uplands and not the tide-lands.

Q. The surveys made by your office are along the line of mean high water? [42]

A. Yes, sir, the meander line was of the mean high water; that we have was made for determining the area of the upland portion of the Reservation for allotment purposes.

Q. So this line at the intersection of the township line at Port Susan, and thence along the shores southeasterly, and following up into Tulalip Bay and Ebey Slough, does that line, that meander line as actually surveyed, in your judgment represent the boundaries of the Tulalip Indian Reservation?

Mr. COLEMAN.—We object to that as calling for a conclusion.

The COURT.—The objection is sustained.

Q. Well, was there any attempt, as a matter of fact, to follow the Presidential proclamation in placing that line, that meander line, on that survey?

Mr. COLEMAN.—We object to that for the reason that it calls for a conclusion and is irrelevant and immaterial. The witness has testified what line was actually run, and the proclamation speaks for itself.

The COURT.—I don't think the witness can help us any by his conclusions.

Q. What reference is made to the mouth of Ebey

(Testimony of E. A. Fitz-Henry.)

Slough in the field-notes?

A. In meandering the mean high-water line there is a little designation by the surveyor where the mouth of Ebey Slough is.

Q. What is that designation?

A. It was monumented, 7.71 chains north of the half section corner, and thence,—I cannot read this—

The COURT.—Is that included in this map here? Can you [43] indicate where that would be?

A. No.

Mr. COLEMAN.—We have a map on which that point is platted.

Q. (Mr. MARTIN.) Will you find that in the certified copy of the field-notes which you have given us. What is that reference to the mouth of Ebey Slough. Turn to the certified field-notes.

A. I will have to look these all over to find it.

Mr. COLEMAN.—Allow me to look, Mr. Fitz-Henry. I think I can call your attention to it. I can probably find it. See if this is not the same. It will save time and this is the map introduced.

A. Yes, sir, it is just the same as the official record.

Mr. MARTIN.—What do you wish to call our attention to in that?

A. It designates the mouth of Ebey Slough, and following a certain distance, then it says, “North 85 degrees east, 18 chains, to the mouth of Ebey Slough. Thence south $85\frac{1}{2}$ degrees east, to telegraph line; thence north 51 degrees east, 15.51 chains, to the

(Testimony of E. A. Fitz-Henry.)

meander corner on the line through the center of Section 32."

Q. Will you take this map and mark those two courses and distances where the surveyor goes beyond the mouth of Ebey Slough.

A. He continues on up across the Reservation to meander that line. That is the course right there (indicating on the map), and that is the point right there.

Q. The language on the plat, "Mouth of Ebey Slough according to meander notes of United States Government," that is the point? [44]

A. Yes, sir; that is the point right there.

Q. Which way did the surveyor go then?

A. He was going this way. He went on this way around like that (indicating).

Mr. COLEMAN.—The court cannot see that. This map ought to be in evidence.

Mr. MARTIN.—We will offer this in evidence.

(The same is admitted and marked Plaintiff's Exhibit No. 2.)

The COURT.—What do you call that? That is the survey of 1874?

Mr. MARTIN.—No. Those are both eliminated.

Mr. COLEMAN.—This is a map upon which the field-notes which ought to be introduced in evidence to make it clear are platted. It is just to illustrate the field-notes.

Mr. MARTIN.—We will offer the field-notes in evidence as exhibit No. 3.

(Testimony of E. A. Fitz-Henry.)

The COURT.—And this is exhibit No. 2, you say?

Mr. MARTIN.—Yes, exhibit No. 2 is on the board and we will offer the certified copy of the field-notes, the exemplified copy.

(The same are admitted and marked Plaintiff's Exhibit No. 3.)

Mr. COLEMAN.—This exhibit No. 3 shows the field-notes; platted, and also shows the tide-land area deeded by the State of Washington to the predecessors in interest of the defendants.

A. The meander line, the mean high-water line, it meanders up like that and across like that, and then over to that point and then meanders down there, and meanders to that point, and at that place in the notes the surveyor [45] set the mouth of Ebey Slough; then meanders around here.

Q. And that meander of Ebey Slough does not pretend to conform to the low-water line or at any point along the shore. A. No.

Q. Is there any reference other than you have already mentioned as to the location of the mouth of Ebey Slough in the surveys?

A. No, there has never been any monument. There is no place designated by a monument as Ebey Slough.

Cross-examination.

(By Mr. COLEMAN.)

Q. Now, the southernmost point of the reservation is here. A. Yes, sir.

Q. And the point of beginning of the proclamation is here on Steamboat Slough. A. Yes, sir.

(Testimony of E. A. Fitz-Henry.)

Q. The contention of the Government is that the boundaries of the Reservation run in a straight line to this point, is that right, Mr. Martin?

Mr. MARTIN.—Yes, at the line of low-water mark and then over to that point.

Mr. COLEMAN.—In a straight line.

Mr. MARTIN.—Yes, on a straight line from the low-water mark there to the low-water mark here.

Mr. COLEMAN.—Your Honor asked about the channel of Steamboat Slough. The channel of Steamboat Slough runs down here, and the channel of Ebey Slough runs down here, [46] and the deep water is down here. That is the main channel of the river. I might state that the Snohomish River has four mouths and the Ebey Slough is one of them. Now Ebey Slough and Steamboat Slough, the water finally comes down here and that is between the tide-lands which are represented by this green area and the reservation line here.

The COURT.—I think you had better get a copy of this.

Mr. MARTIN.—We have an exemplified copy of this.

The COURT.—Very well. That is the exhibit instead of the original?

Mr. MARTIN.—Yes.

The COURT.—Very well, proceed.

Mr. MARTIN.—I think we can further admit in this case that the triangular strip of land, which is the subject of this suit, has been as long as memory of

man goes—it has been, that land formed by the junction of these several waters, has been in existence so long that the memory of man runneth not to the contrary. As long as the oldest inhabitant knows anything about it it was there, and presumably was there at the time the survey was made. It is possible that the silt has added to that area and that the water area is perhaps lessening slowly.

The COURT.—Is there deep water all over that tract of land?

Mr. COLEMAN.—No, your Honor. Let me explain that. This is upland across here. (Indicating on the diagram.) Now this blue line bounds the tidelands which are covered and uncovered daily by the tide. Now there is no water here. This is Smith Island. This is Steamboat [47] Slough, it is one of the branches of Snohomish River and comes down here and takes its course this way.

The COURT.—That is navigable?

Mr. COLEMAN.—Yes, that is navigable, and Ebey Slough is also navigable and comes down this way.

The COURT.—Is that navigable? (Pointing on the map.)

Mr. COLEMAN.—Yes, that is navigable, and this is attached to Smith Island, and in 1893 was surveyed by the Board of Harbor Commissioners of the State of Washington.

Mr. MARTIN.—And for your Honor's information that land also, that particular piece of land was afterwards the subject of a controversy in the Jones-Calvert case.

Mr. COLEMAN.—Oh, no, you are mistaken about that. This land here is clearly upland, and a man named Jones claiming that this land was tide-land undertook to tell Mr. Calvert when he was land commissioner that it was tide-land, and the State of Washington took the position that it was not tide-land, and it was admitted that it was within the bounds of the Indian Reservation. The trial court found it was tide-land, and because it was tide-land did not pass to the Indians, and therefore was within the State of Washington. The Supreme Court of the State decided it was clearly within the lines of the reservation and did not pass to the State, but that is this land here.

Mr. MARTIN.—The Jones land was an allotment and he claimed the right to purchase tide-lands lying in front of that, and the State Supreme Court said that the tide-land in front of that land had been particularly disclaimed, and inasmuch as that had been done, they were entitled to [48] treat the lands in there as part of the Indian Reservation.

Mr. COLEMAN.—Well, this is the channel of Steamboat Slough here. Have you any other evidence?

Mr. MARTIN.—No.

Mr. COLEMAN.—I think that most of the matters involved in here are matters of which your Honor is required to take judicial notice, etc.

(Argument by counsel here followed.)

Mr. MARTIN.—Pardon me a moment. Before you consider the Government's case as closed, it is

clear, your Honor, that this triangular piece of land is in the possession of the defendant.

Mr. COLEMAN.—Well, that is admitted in the pleadings.

Mr. MARTIN.—And that it is by metes and bounds as designated on the plat, that that is the land in question, and that you have the land.

Mr. COLEMAN.—There is this difficulty. It is admitted that triangle is a picture of the land, but whether or not the description could be tied to anything and described by your Honor I don't know.

Mr. MARTIN.—This being an action in ejectment the Government must recover possession of something actual.

The COURT.—*That* is no use in arguing that. We all know that.

Mr. COLEMAN.—The defendants and each of them move to dismiss this case for the reason that the plaintiff has not shown it is entitled to the possession of the land in controversy or the property in controversy, or to any part of it. And for the further reason that it [49] affirmatively appears that said property in controversy belongs to the defendant Everett Improvement Company, and is occupied by the Snohomish River Boom Company as tenant of the Everett Improvement Company. This case is peculiar in this, that I am satisfied that under the law your Honor is supposed to take judicial notice of the actual facts in here and the only aid that counsel could be to you is to inform you of what are established geographical facts. This matter was very

peculiarly treated by the Government. So far as I know,—

(Argument of counsel continued.)

Mr. MARTIN.—Have you any evidence to offer?

Mr. COLEMAN.—No.

Mr. MARTIN.—Counsel has moved to dismiss, and what you have said goes to the entire merits of the case.

Mr. COLEMAN.—Yes.

Mr. MARTIN.—There are one or two points to reply to.

(Argument followed.)

The COURT.—Where is that proclamation found, in what volume of the statute is this proclamation found?

Mr. MARTIN.—The treaty is found in 12 statutes at large, 927, and the executive order establishing the reservation is—

Mr. COLEMAN.—The language of the order is set out in the complaint, your Honor.

The COURT.—And what is the date of that?

Mr. MARTIN.—December 23d, 1873, but I can leave our two volumes here with the Court. Here is the Jones-Carver case that I borrowed from your Honor's library, and the two volumes which contain the treaty and the proclamation. [50]

The COURT.—Let me have the exhibits and the official map. I think I will take this under advisement.

Mr. MARTIN.—Will your Honor desire us to introduce that stipulation? There was one paragraph

we had in there; it is practically all admitted.

The COURT.—Oh, no, that is not necessary.

Mr. MARTIN.—There is another map.

Mr. COLEMAN.—That is identical with the official map introduced. I have no objection to introducing as many as possible, but I want the private marks on them disregarded. I don't know why he wants to introduce it because it is identical with the map already introduced and that matter written on it and colored on it is extraneous.

(The Court then delivered the following decision.)

The United States seeks to recover from the defendants the possession of certain tide-lands situated at Port Gardner, Snohomish County, Washington. The land was sold by the State of Washington to the Everett Improvement Company as tide-lands, and was by the Improvement Company leased to the Boom Company. The issue involves the construction of executive order of December 23, 1873, and the Indian treaty of 1855. Section 2 of the treaty provides, among other things, "That the amount of two sections of 1280 acres, on the north side of Hwoh-whomish and the creek emptying into the same called Kwilt-Cedar, the peninsula at the southeastern end of Perry Island * * * all of which tract shall be set apart and so far as necessary surveyed and marked out for their [51] exclusive use * * *," and further that "there is also reserved throughout the lands hereby ceded the amount of thirty-six sections or one township of land on the northeastern shore of Port Gardner and north of the mouth of Snohomish River, including Tulalip Bay and the be-

fore mentioned Kwilt-Cedar Creek * * * ,” and Article 4, “The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. * * * ” Article 5, “The right of taking fish at usual and accustomed grounds and stations is further secured to the Indians * * * ”

President Grant, December 23, 1873, by executive order, fixed the boundaries of the Tulalip Indian Reservation pursuant to the treaty, as follows: “Beginning at low-water mark on the north shore of Steamboat Slough at a point where the section line between sections thirty-two and thirty-three of township twenty north, range five east, intersects the same; thence north * * * thence west * * * to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore to the shores of Tulalip Bay and Port Gardner with all the meanderings thereof, and across the mouth of Ebey’s Slough to the place of beginning. The following sketch exhibits the land: (Sketch included.)

It is contended by the plaintiff that the meander line along the shore should extend from the most southerly point of the reservation (Priest Point) across the channel to Steamboat Slough, which would include [52] the wedge shaped tide-lands colored black on the sketch; whereas the defendants contend that the boundary follows low-water mark along the channel to the mouth of Ebey’s Slough, which, it is

contended, is above the lands in question, and thence to the point of beginning. At the conclusion of the evidence defendant moved to dismiss.

According to the meander notes U. S. Government, the mouth of Ebey's Slough is practically at X indicated upon the sketch. The testimony shows that the land in question is a part of the tide-lands which extend from and adhere to Smith Island; that these lands are separated by a deep-water channel on the west and north and are independent of the reservation; that Steamboat Slough, which is navigable, is north of the land, and the water of Port Gardner is west and form a navigable channel between the reservation and the land in question entering into Ebey Slough. I think it must be apparent from an examination of the treaty and likewise of the executive order, that the purpose was to grant to the Indians tillable land with such accretions as would naturally belong thereto. I do not think that it could have been the intention of the executive order to have included tide-lands which are entirely separated and segregated from the uplands of the reservation. If it had been the intention to grant any special water privileges across the navigable water upon which the reservation borders, fitting language would have been employed. A casual reading of the executive order, together with a consideration of the mouth of Ebey Slough [53] as fixed by the United States Government notes, however, is conclusive upon the plaintiff. The mere fact that the executive order in general terms, reads, "southeasterly with the line of low-

water mark along said shore * * * of and across the mouth of Ebey Slough to the place of beginning" cannot be read to extend across the waters of Port Gardner, but must be carried to the mouth of Ebey Slough, even though the course may not be directly southeasterly to the point of commencement.

The motion to dismiss is granted.

To which ruling of the Court the plaintiff excepts and its exception is allowed.

That the exhibits referred to in the foregoing transcript as Plaintiff's Exhibits I, II, and III, are hereto attached, so marked and incorporated herein by reference.

CLAY ALLEN,
United States Attorney,
WINTER S. MARTIN,
Assistant United States Attorney,
For Plaintiff.

Stipulation Re Bill of Exceptions.

It is stipulated that the foregoing bill of exceptions is correct in all respects and as such may be by the Court approved, allowed and settled as the bill of exceptions in said cause and as such may be filed in said cause and made a part of the record herein, reserving the right to file supplementary bills in the event same may be required. [54]

CLAY ALLEN,
WINTER S. MARTIN,
Attorneys for Plaintiff.
J. A. COLEMAN,
Attorney for Defendants.

Order Approving Bill of Exceptions.

The foregoing bill of exceptions is correct in all respects and is hereby approved, allowed and settled and signed, and may be a part of the record herein.

Done in open court this 8th day of January, 1917.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 8, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [55]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469—AT LAW.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,

Defendants.

Petition for Writ of Error.

Now comes the United States of America by Clay Allen, United States Attorney for the Western District of Washington, and respectfully shows that on the 15th day of May, A. D. 1916, this Court entered judgment of dismissal in the above-entitled cause in favor of the defendants and against this plaintiff, in

which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the ninth circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

CLAY ALLEN,

United States Attorney.

WINTER S. MARTIN,

Assistant United States Attorney. [56]

[Endorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 10, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [57]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469—AT LAW.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,

Defendants.

Assignment of Errors.

Now comes the plaintiff, the United States of America, and assigns error in the decision of the said District Court as follows:

I.

The Court erred in granting the motion of defendants for a dismissal of said cause for the reason that judgment should have been rendered for the plaintiff upon all the evidence in the cause.

II.

The Court erred in holding that the lands described in the complaint title and possession to which were sought in the present action were not a part of the Tulalip Indian Reservation.

III.

The Court erred in holding that the mouth of Ebey Slough as determined and fixed by the United States [58] engineers in the course of the reservation survey controlled and fixed the mouth of said Ebey Slough.

IV.

The Court erred in holding that the lands in question was tideland which was not a part of the Indian reservation.

V.

The Court erred in not entering judgment in favor of the plaintiff upon all the evidence in the case according to the prayer of the complaint.

VI.

The Court erred in dismissing said cause.

WHEREFORE the United States of America prays that the judgment of the said court be reversed and this cause remanded to the said District Court, with directions to grant a new trial or to enter judgment in favor of the plaintiff in said cause.

CLAY ALLEN,

United States Attorney.

WINTER S. MARTIN,

Assistant United States Attorney.

Filed this 10th day of November, 1916.

Clerk of the United States District Court for the
Western District of Washington, Northern
Division. [59]

[Endorsed]: Assignment of Errors. Filed in the
U. S. District Court, Western Dist. of Washington,
Northern Division. Nov. 10, 1916. Frank L. Crosby,
Clerk. By Ed M. Lakin, Deputy. [60]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2469—AT LAW.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,

Defendants.

Order Allowing Writ of Error.

This 10th day of November, A. D. 1916, came the plaintiff by Clay Allen, United States Attorney for the Western District of Washington, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the ninth judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error without bond.

JEREMIAH NETERER,

United States District Judge, for the Western Dis-
trict of Washington, Northern Division.

[Endorsed]: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 10, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [61]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,

Defendants.

**Order Directing Transmission of Original Exhibits
to Appellate Court.**

Now on this 9th day of January, 1917, upon motion of Clay Allen, United States Attorney, and for sufficient cause appearing, it is ordered that the Plaintiff's Original Exhibits Nos. 1, 2 and 3, filed and introduced as evidence upon the trial of this cause, be by the clerk of this court forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of the record on appeal in this cause.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Order to Transmit Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 9, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [62]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,

Defendants.

**Order Extending Time to and Including February
10, 1917, to Prepare, etc., Transcript of Record.**

Now on this 5th day of December, 1916, upon motion of proctor for plaintiff and for sufficient cause appearing, it is ordered that the time within which the clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 10th day of February, 1917.

JEREMIAH NETERER,

District Judge.

[Endorsed]: Order Extending Time to Send Transcript to Circuit Court of Appeals. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 5, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [63]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,

Defendants.

**Order Extending Time to and Including April 1,
1917, to Prepare, etc., Transcript of Record.**

Now, on this 8th day of February, 1917, upon motion of proctor for plaintiff and for sufficient cause appearing, it is ordered that the time within which the clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 1st day of April, 1917.

JEREMIAH NETERER,

District Judge.

[Endorsed]: Order Extending Time to Send Transcript to Circuit Court of Appeals. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 8, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [64]

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation, and EVERETT IMPROVEMENT COMPANY, a Corporation,

Defendants in Error.

Writ of Error (Copy).

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America: To the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between the United States of America, as plaintiff and Snohomish River Boom Company, a corporation, and Everett Improvement Company, a corporation, as defendants, a manifest error hath happened, to the

great damage of the said United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things [65] concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said court is sitting in said circuit within thirty days from the date hereof, to wit, the —— day of December, A. D. 1916, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 10th day of November, 1916.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington, Northern Division.

Allowed this 10th day of November, 1916.

JEREMIAH NETERER,
Judge of the District Court of the United States, for
the Western District of Washington, Northern
Division.

Received a copy of the within Writ of Error this 14th day of Nov., 1916.

J. A. COLEMAN,
Attorney for Defendant. [66]

[Endorsed]: No. 2469. In the Circuit Court of the United States, for the Ninth Circuit. United States of America, Plaintiff in Error, v. Snohomish River Boom Company, a Corporation, et al., Defendants in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 10, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.[67]

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2469.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation, and EVERETT IMPROVEMENT COMPANY, a Corporation,
Defendants in Error.

Citation on Writ of Error (Copy).

United States of America,
Ninth Judicial Circuit,—ss.

To Snohomish River Boom Company, a Corporation,
and Everett Improvement Company, a Corporation,
GREETINGS:

You are hereby cited and admonished to be and

appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty (30) days from the date hereof, to wit, on the 10th day of December, A. D. 1916, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein United States of America is plaintiff in error, and the Snohomish River Boom Company, a corporation, and Everett Improvement Company, a corporation, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf. [68]

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 10th day of November, 1916.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within Citation this 14th day of Nov., 1916.

J. A. COLEMAN,
Attorney for Defendant.

[Endorsed]: No. 2469. In the Circuit Court of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, v. Snohomish River Boom Company, a corporation, et al., Defendants in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of

Washington, Northern Division, Nov. 10, 1916.
Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[69]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY, a Corp.,
and EVERETT IMPROVEMENT CO.,

Defendants.

Praeipice for Transcript of Record.

To the Clerk of the Above-Entitled Court:

You will please prepare record for purposes of Writ of Error in the Circuit Court of Appeals for the Ninth Circuit and include therein the following, to wit: Complaint, Summons, Marshal's Return of Service; Answer; Opinion of Court; Judgment; Stipulation Extending Time to File Bill of Exceptions; Order Extending Time to File Bill of Exceptions; Order Further Extending Time to File Bill of Exceptions; Bill of Exceptions; Order Allowing Same; Petition for Writ of Error; Assignment of Errors; Order Allowing Writ of Error; Citation in Error; Writ of Error; Order Transmitting Original

Exhibits; Orders Extending Time to File Transcript of Record.

CLAY ALLEN and

WINTER S. MARTIN,

United States Attorney and Asst. U. S. Atty,

For Plaintiff.

[Endorsed]: Praeceptum. Filed in the U. S. District Court, Western District of Washington, Northern Division. Mar. 26, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [70]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,

Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record, etc.**

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 70 typewritten pages, numbered from 1 to 70, inclusive, to be a full, true and correct copy of the record and

proceedings in the above and foregoing entitled cause and the entire record as the same remain of record and on file in the office of the clerk of said court, save and excepting Plaintiff's Exhibits Nos. 1, 2 and 3, separately certified of even date herewith, and transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the record upon appeal in this cause—said exhibits being transmitted pursuant to the order of the District Court made in the said cause January 9, 1917, and that the same constitutes the record on appeal from the Judgment of the District Court of the United States, for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit. [71]

I further certify that I hereto attach and herewith transmit the original Citation and Writ of Error issued in this cause.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. R. S.) for

making record, certificate or re-

turn, 155 folios at 15c.....\$ 23.25

Certificate of Clerk to transcript of

record—4 folios at 15c..... .60

<i>Snohomish River Boom Company et al.</i>	71
Seal to said Certificate.....	.20
Certificate of Clerk to original exhibits, 3 folios at 15c.....	.45
Seal to said Certificate.....	.20
<hr/>	
Total.....\$	24.70

I hereby certify that the above cost for preparing and certifying record amounting to \$24.70, chargeable to the United States, will be included in my account against the United States for Clerk's fees for the quarter ending March 31, 1917.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 27th day of March, 1917.

[Seal]

FRANK L. CROSBY,
United States District Clerk. [72]

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2469.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

SNOHOMISH RIVER BOOM COMPANY,
a Corporation, and EVERETT IMPROVE-
MENT COMPANY, a Corporation,
Defendants in Error.

Citation on Writ of Error (Original).

United States of America,
Ninth Judicial Circuit,—ss.

To Snohomish River Boom Company, a Corporation,
and Everett Improvement Company, a Corporation, GREETINGS:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty (30) days from the date hereof, to wit, on the 10th day of December, A. D. 1916, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein United States of America is plaintiff in error, and the Snohomish River Boom Company, a Corporation, and Everett Improvement Company, a Corporation, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf. [73]

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 10th day of November, 1916.

JEREMIAH NETERER,
United States District Judge. [74]

[Endorsed]: No. 2469. In the Circuit Court of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, v. Snohomish River Boom Company, a Corporation, et al., Defendants in Error. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 10, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

Received a copy of the within Citation this 14th day of Nov., 1916.

J. A. COLEMAN,
Attorney for Defendant. [75]

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2469.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

SNOHOMISH RIVER BOOM COMPANY, a Corporation, and EVERETT IMPROVEMENT COMPANY, a Corporation,
Defendants in Error.

Writ of Error (Original).

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America: To the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division:

Because in the record and proceedings, as also in

the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between the United States of America, as plaintiff and Snohomish River Boom Company, a corporation, and Everett Improvement Company, a corporation, as defendants, a manifest error hath happened, to the great damage of the said United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things [76] concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting in said circuit within thirty days from the date hereof, to wit, the —— day of December, A. D. 1916, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 10th day of November, 1916.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington, Northern
Division.

Allowed this 10th day of November, 1916.

JEREMIAH NETERER,
Judge of the District Court of the United States, for
the Western District of Washington, Northern
Division. [77]

[Endorsed]: No. 2469. In the Circuit Court of
the United States for the Ninth Circuit. United
States of America, Plaintiff in Error, vs. Snohomish
River Boom Company, a Corporation, et al., Defend-
ants in Error. Writ of Error. Filed in the U. S.
District Court, Western Dist. of Washington, North-
ern Division. Nov. 10, 1916. Frank L. Crosby, Clerk.
By Ed M. Lakin, Deputy.

Received a copy of the within Writ of Error this
14th day of Nov., 1916.

J. A. COLEMAN,
Attorney for Defendant. [78]

[Endorsed]: No. 2962. United States Circuit
Court of Appeals for the Ninth Circuit. The United
States of America, Plaintiff in Error, vs. Snohomish
River Boom Company, a Corporation, and Everett
Improvement Company, a Corporation, Defendants

in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed March 30, 1917.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2962

IN THE

**United States Circuit Court
of Appeals
For the Ninth Circuit**

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.

SNOHOMISH RIVER BOOM COMPANY,
a corporation, and EVERETT
IMPROVEMENT COMPANY, a corpo-
ration,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION.

HON. JEREMIAH NETERER, *Judge.* MAY 12 1911

Brief of Plaintiff in Error

CLAY ALLEN,
United States Attorney.

WINTER S. MARTIN,
Assistant U. S. Attorney.

310 Federal Building,
Seattle, Washington.

IN THE
**United States Circuit Court
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Brief of Plaintiff in Error

STATEMENT OF THE CASE.

This action is one in ejectment brought by the United States to recover possession of a triangular strip of tide-land at the mouth of Ebey Slough in the waters adjacent to a part of the Tulalip Indian

—first, the true location of the southeastern boundary of the Tulalip Indian Reservation in that portion of it which locates and definitely fixes the mouth of Ebey Slough; and second, even though the land in suit is found to lie outside the reservation boundary, is it a part of the reservation by reason of being accretion lands attached to the upland.

In this connection it should be noted that the court found that the land in question was detached and separated from the adjoining main land by a deep-water channel

ASSIGNMENTS OF ERROR.

I.

The Court erred in granting the motion of defendants for a dismissal of said cause for the reason that judgment should have been rendered for the plaintiff upon all the evidence in the cause.

II.

The Court erred in holding that the lands described in the complaint title and possession to which were sought in the present action were not a part of the Tulalip Indian Reservation.

III.

The Court erred in holding that the mouth of Ebey Slough as determined and fixed by the United States engineers in the course of the reservation survey controlled and fixed the mouth of said Ebey Slough.

IV.

The Court erred in holding that the lands in question was tide-land which was not a part of the Indian reservation.

V.

The Court erred in not entering judgment in favor of the plaintiff upon all the evidence in the case according to the prayer of the complaint.

VI.

The Court erred in dismissing said cause.

ARGUMENT.

The government's contention in this case is that the triangular strip of land in issue in this case is a part of the Tulalip Indian Reservation and as such never vested in the state of Washington and therefore a title deraigned from the state would be null and void and the defendants would

be liable in ejectment.

The first question which arises is; did the court err in holding that the southeastern boundary of the reservation followed the sinuosities of the shore line north to the point arbitrarily designated by the surveyor as the mouth of Ebey Slough?

The government contends that Ebey Slough continues south far enough to include this triangular piece of tide-land. The court has fixed the mouth at the cross point on the diagram (see page 18, transcript) far inside the slough and opposite the narrow mouth of Kwilt-Cedar Creek, whereas the slough widens in its course south and really extends to the land in issue. If the court should agree with the plaintiff in error in its contention that the southeastern boundary of the reservation is not at the point fixed by the court but follows in a straight line to the point of beginning across the broad open mouth of the slough from the most southern tip of the reservation land, then the court must as a consequence hold that the land in issue which as a physical fact lies inside the reservation line contended for, is a part of the Tulalip Indian

Reservation. If, on the other hand, this court should agree with the lower court in its finding respecting the reservation line, the further question arises, viz., does it follow as a matter of law that a detached sand bar separated from the mainland by a narrow channel but immediately adjacent thereto is not such tide-land as becomes a part of the reservation?

POINT ONE.

The reservation line referred to should extend from the southernmost tip of the reservation in a straight line to the point of beginning across the broad mouth of the slough.

President Grant by executive order, December 23, 1873, fixed the boundaries of the Tulalip Reservation pursuant to the treaty of 1855 as follows:

“Beginning at low water mark on the north shore of Steamboat Slough at a point where the section line between sections thirty-two and thirty-three of township twenty north, range five east, intersects the same; thence north * * * ; thence west * * * to low water mark on the shore of Port Susan; thence southeasterly with the line of low water mark along said shore to the shores of Tulalip Bay

and Port Gardner with all the meanders thereof, and across the mouth of Ebey's Slough to the place of beginning."

Reference to plaintiff's Exhibit I shows that the southerly boundary of the reservation extends to the most southerly part of the reservation, to wit, Priest Point, before coming to the next call, which is, "*and across the mouth of Ebey's Slough to the place of beginning.*"

Why then should the court follow the arbitrary course of the surveyor and go inland with the sinuosities of the shore far up into the slough across the Kwilt-Cedar creek to the arbitrary point selected by the surveyor as the slough mouth?

The evidence shows that the original survey of the reservation was commenced on the 6th day of August, 1873, and continued until May 22, 1874. (See Surveyor-General Fitz-Henry's testimony at page 39 of Transcript.)

The President's proclamation was not made until December of 1873. It was evidently the purpose of the Indian Office to have the survey work well advanced before submitting the proclamation

to the President for signature.

Mr. Fitz-Henry was then asked:

“Q. Do you know and have you examined the records to ascertain whether this survey which was actually made followed the call of the presidential proclamation establishing the reservation?

“A. The east and north boundary was surveyed and monumented according to the proclamation, but that portion of the boundary line bordering on the Sound, or the salt water was never monumented. The meander line was surveyed along mean high-water line for the purpose of ascertaining the area of the fractional lots bordering on salt water.”

Transcript, p. 39.

And again, Mr. Fitz-Henry after stating that a supplemental map and survey showing the boundaries of the Indian Agency were made on June 24, 1874, was asked:

“Q. Now referring to the survey of 1874, does that in any way attempt to locate the south and west line of the reservation along salt water?

A. No, sir. That survey, according to the proclamation, or the boundary line according

to the proclamation, was never made or attempted to be made. The only survey along the water front was made to determine the area of the fractional lots."

Transcript, p. 40.

And again the same witness was asked:

"Q. And the survey of 1903 and 1904 you refer to the lines of the reservation there?

A. That refers to the agency on Tulalip Bay and the north and east boundary which was monumented. There has never been any attempt on the part of the government to monument the boundary along the water front.

Q. So that the surveys of 1903 and 1904 re-set, and re-establish the east and north line of the reservation?

A. Yes, sir.

Q. And no effort was made to outline the land below the high-water mark or to change the meander line originally made?

A. No, sir.

Q. Mr. Fitz-Henry, have there been any other surveys excepting the three you have testified to?

A. No, those are the only surveys that have

been made. That is what my office records show.

Q. And in the surveys thus made only one of them, the original survey, had anything to do with the meander line?

A. The original survey surveyed the meanders of mean high-water line along the water front.

Q. How do you explain the fact that the meander line of the first survey followed the sinuosities of the shore of Ebey Slough away up inside the mouth and beyond the mouth? (Transcript, p. 41.)

A. That meander line was run to determine the area of the upland portion of the reservation and to separate the water survey from the land survey.

Q. And without regard to the actual call of the reservation?

A. No, sir.

Q. Mr. Fitz-Henry, where would the line in your judgment, following the call of the reservation, where would that line be?

(Objection and argument.)

THE COURT: He may state where he believes the line of low-water mark would be.

Q. (MR. MARTIN): Just outline it, Mr.

Fitz-Henry.

A. It would be impossible to follow the survey all the way around here. To determine the low water line would require a system of soundings and markings by buoys. You would have to survey along the high-water line. Otherwise it would take a year or more to determine that and mark it at low water, so there has been no attempt on the part of the Government (Transcript, p. 42) to monument the low-water line.

* * * * *

Q. The surveys made by your office are along the line of mean high water?

A. Yes, sir, the meander line was of the mean high water; that we have was made for determining the area of the upland portion of the reservation for allotment purposes." (Transcript, p. 43.)

At this point the expert engineer and Surveyor General was asked his opinion whether the meander line referred to was the proper boundary line of the reservation. This question was disallowed on objection, although it would seem to be a mixed question of law and of technical fact, the expert answer to which would enlighten the court. It

would have served to distinguish between a boundary line conforming to the calls of the proclamation establishing the reservation, and an arbitrary engineer's line projected for the purpose of computing upland area, probably a base line for other work.

The witness was then asked:

“Q. What reference is made to the mouth of Ebey Slough in the field notes?

A. In meandering the high-water line there is a little designation by the surveyor where the mouth of Ebey Slough is.” (Transcript, pp. 43-44.)

* * * * *

“Q. Will you take this map and mark those two courses and distances where the surveyor goes beyond the mouth of Ebey Slough.

A. He continues on up across the reservation to meander that line. That is the course right there (indicating on the map) and that is the point right there.

Q. The language on the plat, ‘Mouth of Ebey Slough according to meander notes of United States Government,’ that is the point?

A. Yes, sir, that is the point right there.”

(Transcript, p. 45.)

* * * * *

“Q. And that meander of Ebey Slough does not pretend to conform to the low-water line or at any point along the shore.

A. No.

Q. Is there any reference other than you have already mentioned as to the location of the mouth of Ebey Slough in the surveys?

A. No, there has never been any monument. There is no place designated by a monument as Ebey Slough.” (Transcript, p. 46.)

It will thus be seen that the presidential proclamation was not followed in the surveys. The first survey commenced three months before the reservation was established and continued into 1874. The east line running north and south and the north line running east and west were run according to the calls of the proclamation. The water boundaries were fixed by the proclamation as the line of low-water mark on the shores of Port Susan and then we have for the next call,

“Then southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the

meanders thereof, and *across the mouth of Ebey Slough to the place of beginning.*”

There was no attempt to establish the water boundary. Certainly a high-water meander shore line is not the same as the line marking mean low tide.

Meander is defined in the Standard Dictionary as, “to wind about, turn or flow around, to survey roughly, to wind and turn while proceeding in a course.”

Nothing is said of proceeding by the meanders of the slough to any arbitrary point. The language particularly calls for the reservation line to follow low-water mark up into Tulalip Bay and Port Gardner and then as if the necessity for observing the sinuosities, indentation or irregularities of the shore line were at end, recites:

“And across the mouth of Ebey Slough to the place of beginning.”

Evidently the proclamation as drawn contemplated that the mouth of Ebey Slough was immediately at hand so that the line when it left Priest Point (the most southerly point of land before you enter

the slough) would immediately strike out across the broad open mouth of the slough to the point of beginning.

Plaintiff in error will concede that the court has to determine the mouth of Ebey Slough from the language of the proclamation. There is nothing in the language employed which requires the court to follow an arbitrary line, established solely for purpose of computing the area and fixing the location of allotments of upland. Neither is there any compelling reason why the surveyor's notation in his field notes should be followed to determine and fix the mouth of Ebey Slough. The testimony shows that the line marking the mouth of the slough was never monumented. The only reference to it was the X mark on the map taken from the field notes and this line as surveyed made no attempt to establish the reservation boundary.

The government contends that the question is a geographical one, viz., where is the mouth of a river or slough which reaches out and into a great bay or wide arm of the sea? Should the line of the sea into which the river flows and the line of the

mainland touching the sea on each side of the river or bay mouth be taken, or should one proceed inland along the shores of this arm of the sea or wide river mouth to a point where the river narrows sufficiently to be bridged or forded?

Reference to the drawing at page 18 of the Transcript and to the exhibit submitted with the record, will show that the construction contended for does no violence to reason, nor to the physical or geographical facts, whereas to proceed far inland across the mouth of Kwilt-Cedar Creek to an arbitrary point fixing the mouth of Ebey Slough does violence to both. No law which we could cite would be at all useful to the court under the circumstances. The court has for its legal guide the calls of the presidential proclamation and it must construe the same in a manner consistent with the intention of the framer of the Act. The plain words used indicate to the writer's mind a purpose to stop following the irregularities of the shore and to strike out boldly across the broad mouth of the slough without waiting for the surveyor to meander inland and select his own line.

If this court adopts the reasoning advanced and construes the call in question as projecting the boundary in a straight line across the broad area of water at the mouth of Ebey Slough where it enters the Sound, then the other contentions of plaintiff in error must be supported, viz., the triangular strip of land lies inside the reservation line and therefore is government land to which the State of Washington had not title. It then follows that ejectment will lie to recover the land as belonging to the Indian Reservation.

POINT TWO.

Should the court hold with the lower court as to the location of the boundary line at the point arbitrarily selected by the surveyor, there is still another question, viz., is the triangular strip of land in issue not a part of the reservation because of its tideland character without regard to the existence of a small deep water channel between it and the main land when the land and the channel were clearly caused by tidal action?

By the enabling act Washington was admitted on the condition of disclaiming title, control and

jurisdiction of Indian lands. In section one of article 26 of the State Constitution this provision of the enabling act was incorporated verbatim and in addition this further disclaimer was written, viz.:

“All title in and claim to all tide, swamp and overflowed lands patented by the United States, provided the same is not impeached by fraud.”

Jones vs. Callvert, 32 Wash. 610.

Treating the proclamation establishing the reservation as a grant by the general government to the Indian Department for the benefit of the Indians, did not the government intend to grant the adjoining tide lands? And conceding that it did, what then is the legal situation respecting a detached strip of tide land or sand bar which has been formed by the accumulation of silt due to changing tidal conditions?

This land was made by the mud and silt deposited by the slough and will undoubtedly in time become a part of the mainland, by process of accretion. It is only separated by a small channel, as a reference to the exhibit maps will show. On either

side of the mouth of Ebey Slough on the Sound, the reservation line by the proclamation runs to mean low water. This line when extended or projected across Ebey Slough would obviously include the triangular strip of land because by the calls of the proclamation, the southeasterly boundary line after emerging from Ebey Slough (assuming for the sake of argument that the lower court is right with reference to the mouth of Ebey Slough) continues easterly along the north shore of Steamboat Slough to the place of beginning. A straight line from Priest Point across this body of water, whatever its name, picks up the reservation boundary on the opposite shore and continues to the point of beginning.

Why, then, does not all the tide land on the easterly side of the slough extend westerly to low water at the channel edge between the triangular strip and Priest Point?

The government owns the tide lands adjacent to the reservation and did not part with them by admitting Washington as a state.

Jones vs. Callvert, supra;

Schively vs. Bawlbay, 152 U. S. 1;

United States vs. Winans, 198 U. S. 371.

For these reasons it would seem that the government owns the land in suit because it is practically a part of the reservation tide lands. Finally we argue that the government owns this triangular strip of land because of its ownership of the lands opposite this land on each side of the slough as one of the attributes of riparian ownership, particularly when you consider the express disclaimers on the part of the state.

The owners of land bordering on navigable waters are entitled to any increase of the soil by accretion.

New Orleans vs. United States, 35 U. S. 662.

Jones vs. Soulard, 65 U. S. 41.

The owner of land on both sides of a river above tide waters owns the islands therein to the extent of the length of his lands opposite to them.

Granger vs. Avery, 64 Me. 292.

See also *McCullough vs. Wall*, 53 Am. Dec. 715, where it is said:

“But islands in rivers, like rocks (which are only small islands), fall under the same rules concerning ownership which apply to the soil covered by water. This proposition, which seems to have been established by a consideration of the instances of islands formed by alluvial deposits, embraces all islands, whether of recent formation or remote origin: 3 *Kent’s Com.* 427; 2 *Bla. Com.* 261; *Ingraham vs. Wilkinson*, 4 Pick. 269 (16 Am. Dec. 342); *Hargrave’s Law Tracts*, 5-36. If they have not been otherwise appropriated by some lawful means, they belong in severalty to the owners of land on each side of the stream, according to the line of division which would have existed if they had continued under water. An island lying on one side of the *filum aquae* belongs to the owner of the bank on that side if no opposing right to it has been lawfully acquired by another person. If it is situated so near the middle of the river that the original *filum aquae* passed through it, and no opposing right has been acquired, it belongs to the owners on the two banks, according to the original dividing line.”

See also case of *Freeman et al. vs. Bellegarde et al.* (Cal. 1895 Supreme Court), 41 Pac. 389, which holds that a boundary running to the mouth of a certain creek, thence ascending said creek

made the thread of the creek the boundary line, regardless of the last named courses and distances even though the creek was a tidal stream.

This case applies with striking force to the present case. It sustains our argument that the boundary line would be the center of the slough. It would seem to settle any doubt as to the title of accretion land lying within the mouth of this body of water.

These cases would seem to establish the right on the part of the government to the island formed between the two shores of Port Gardner Bay or Ebey Slough without regard to where the boundary line crosses the slough. Granting the defendant's contention that the boundary line follows the sinuosities of the shore line on its course to the arbitrary point selected by the surveyor, yet the line turns south on the opposite shore to a point immediately opposite Priest Point in a straight line before turning east along the north shore of "Steamboat Slough to the point of beginning."

The government originally had title to all of the land under navigable water, in trust for the

benefit of the people. It carved out of the public domain certain Indian lands which lay on each side of a navigable bay or slough mouth. The state of Washington disclaimed title to Indians' lands and to tide lands. The land in question was formed by alluvial accretions and lies between the shores or banks of the slough or bay within the bay mouth as established by a straight line laid squarely across it, whatever you may call this body of water.

Upon these considerations we believe the court erred in dismissing the case on motion for a nonsuit, for the maps, plat and location of the slough, and its approaches, as well as the location of the land in issue, clearly show it to be government land.

Respectfully submitted,

CLAY ALLEN,

United States Attorney.

WINTER S. MARTIN,

Assistant United States Attorney.

2962

No. ~~2469~~

In The ³

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HON. JEREMIAH NETERER, Judge.

Brief of Defendants in Error

J. A. COLEMAN, **F. D. Monckton**
Attorney for Defendants in Error.
401 American Bank Building,
Everett, Washington.

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HON. JEREMIAH NETERER, Judge.

Brief of Defendants in Error

STATEMENT OF THE CASE.

This action of ejectment, tried without a jury,
was at the conclusion of the case of the plaintiff
in error dismissed upon motion of the defendants

in error, on the ground that the plaintiff in error had failed to establish its ownership or right to possession of the tide lands involved.

The facts are undisputed. Most of them relate to geographical and historical matters within the judicial knowledge of the court. Briefly they are as follows: The treaty between the United States and certain Indian tribes, which is set forth in 12 U. S. Statutes at Large, 927 et seq., was concluded on January 22, 1855, and proclaimed April 11, 1859. By its terms the several Indian tribes therein mentioned ceded, relinquished and conveyed to the United States all their right, title and interest in and to a large part of the Northwestern portion of what is now the State of Washington. In regard to the Tulalip Indian Reservation the treaty contained the following:

“Article 3. There is also reserved from out of the lands hereby ceded the amount of thirty-six sections, or one township of land, on the Northwestern shore of Port Gardner and north of the mouth of the Snohomish River, including Tulalip Bay and the aforesaid mentioned Kwilt Ceda Creek for the purpose of

establishing thereon an agricultural and industrial school * * *.”

The reference to the Kwilt Ceda is contained in Article II of the treaty and is as follows:

“There is, however, reserved for the present use and occupation for said tribes and bands, the following tracts of lands, viz: * * * the amount of two sections or 1280 acres, on the north side of Hwhomish Bay and the creek emptying into the same called Kwilt Ceda, * * *.”

On December 23, 1873, President Grant by an executive order defined and described the boundaries of the Tulalip Indian Reservation as follows:

“Beginning at low water mark on the north shore of Steamboat Slough at a point where the section line between Sections 32 and 33 of township 30 north, range 5 east intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5 to the township line between townships 30 and 31; thence west on said township line to low water mark on the shore of Port Susan; thence Southeasterly with the line of low water mark along said

shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Ebey's Slough, to the place of beginning."

The United States caused a survey of the Tulalip Indian Reservation to be made, the work of which commenced August 6, 1873, and continued until May 22, 1874. Trans. 39. Based on that survey an official map was made, an exemplified copy of which is in the record, marked plaintiff's Exhibit No. 1. The field notes of this survey are in the evidence, marked plaintiff's Exhibit No. 3. Trans. 45 and 46. There is also in the evidence a map (plaintiff's Exhibit No. 2), upon which these field notes have been platted, and this exhibit also shows the tide land area deeded by the State of Washington to the predecessors in interest of the defendants. Trans. 46. This exhibit shows Smith Island. The blue line shows the tide lands attached to Smith Island, which tide lands are covered and uncovered daily by the tide. Trans. 48. It is that part of these tide lands which are colored black on the diagram attached to Judge Neterer's memorandum decision, (Trans. 18), that are the subject

of this controversy. That portion of these tide lands do not form an island as one might suppose, if looking only at said diagram for information. That part of the tide lands shown by the dark coloring on the diagram are only a part of a larger tract, which attaches to Smith Island. This is made clear by an examination of the plaintiff's Exhibit 2. On this exhibit the line of the field notes is indicated in red. To avoid confusion, it may be necessary to explain that the red line around Smith Island and the land south of the Snohomish River has nothing to do with the Reservation, as Smith Island and that land admittedly are not within the boundaries of the Reservation. The purpose in showing Smith Island on that exhibit was to show that the tide lands in dispute attach to Smith Island, and do not attach to any part of the upland of the Indian Reservation. These tide lands are enclosed by blue lines on said plat. It is not disputed that there is a deep water navigable channel between said tide lands and the upland of the Reservation.

It is admitted, because affirmatively pleaded in the answer and not denied by the reply, (Trans.

10-15), that at the time of the admission of the State of Washington into the Union the tide lands involved in this litigation were under the tide waters and within the limits of said state, and thereupon became the property of said state, and that on February 4, 1893, the State of Washington, for a valuable consideration and pursuant to the laws of said state, granted and conveyed to the Everett Land Company certain tide lands, which are appurtenant to Smith Island, (not a part of said Indian Reservation), and that the tide lands in dispute herein are a part of the tide lands so conveyed by the State of Washington to said company, and that the defendant Everett Improvement Company by several mesne conveyances from the Everett Land Company has become and now is the owner of the tide lands described in the complaint and that it has leased a portion thereof to the defendant Snohomish River Boom Company. It was alleged in the complaint that the tide lands in dispute had grown up since the date of the executive order, but the Government offered no proof to sustain that allegation, but on the con-

trary admitted upon the trial that these tide lands which admittedly attach to uplands not a part of the Indian Reservation, had been in existence so long that the memory of man runneth not to the contrary. Trans. 47, 48.

THE QUESTION IN DISPUTE.

The Government bases its contention that the tide lands involved herein are within the boundaries of the Tulalip Indian Reservation solely upon its construction of the language "and across the mouth of Ebey Slough, to the place of beginning," contained in the executive order describing the boundaries of the Reservation. There is no question about the east boundary, or about the north boundary, or about the westerly boundary of the Reservation. The dispute arises over the southerly boundary. The Government contends that the words "across the mouth of Ebey Slough, to the place of beginning," describe a straight line from the point of low water at the southermost point of the Reservation eastward and slightly northward to the southeast corner of the Reservation, which latter corner is on Steamboat Slough,

and about a mile directly south of Ebey Slough. See plaintiff's Exhibit 1. This contention is based solely on the use of the word "southeasterly," it being contended that when the line of the westerly boundary of the Reservation ceases to run southeasterly it ends, and that the description must be closed by a straight line from that point to the place of beginning. The contention of the defendants is that the mouth of Ebey Slough is as indicated in the Government field notes, and that the southerly boundary of the Reservation is about a mile north of the north boundary of the tide lands in dispute herein.

The plaintiff in error also urges for the first time in its brief that notwithstanding the fact that the tide lands in dispute may lie outside of the boundaries of the Indian Reservation, they are nevertheless a part of the Reservation because of their tide land character, notwithstanding the admitted fact that these tide lands are not attached to any part of the upland of the Reservation, but are attached to upland admittedly not within the Reservation, and notwithstanding the further ad-

mitted fact that there is a deep water navigable channel between these tide lands and any upland of the Reservation. The mere statement of this proposition shows its unsoundness.

ARGUMENT.

The Boundaries of the Indian Reservation

It seems to me that the contention of the government to the effect that the southerly boundary of the Reservation is a straight line from the point of low water at the southermost point of the Reservation to the southeast corner of the Reservation cannot be sustained for the following reasons: (for convenience sake we will refer to said boundary as the "straight line").

1. To sustain it would imply that the place of beginning was on Ebey Slough, when as a matter of fact, accordig to all the maps in evidence, the place of beginning is not on Ebey Slough but on Steamboat Slough and nearly a mile from the nearest point on Ebey Slough.

2. To sustain it would imply that Ebey Slough extends south at least to said "straight

line," when as shown by all the maps in evidence Ebey Slough is but one of several mouths of the Snohomish river, namely: Ebey Slough, Steamboat Slough, Union Slough, and the main river, all of which empty into Port Gardner. Ebey Slough is the mouth of the river farthest north. About a mile south of it is Steamboat Slough. The said "straight line" contended for by the government does not run near Ebey Slough, but runs into Steamboat Slough;

3. The said "straight line" contended for by the Government is inconsistent with the field notes of the Reservation, which specifically fixes the mouth of Ebey Slough and so designated it about a mile north of said "straight line." See Exhibit 3;

4. The establishment of said "straight line" as the boundary of the Reservation would include within the boundaries of the Reservation a large body of water. That this was not intended is apparent from the fact that such was not provided for in the treaty, which by its terms did include Tulalip Bay, and the Kwilt Ceda creek;

5. The treaty gave to the Indians thirty-six sections of land, but no water except Tulalip Bay and Kwilt Ceda creek. The actual quantity of land, including all water included in the Reservation, as shown by the official map, (Exhibit 2), is 22489.91 acres, which is a quantity more than four hundred acres in excess of thirty-six sections. To establish the said "straight line" as a boundary would give the Indians an additional bay as large as Tulalip Bay;

6. It is apparent from the executive order that it was the intention of the Government to give to the Indians a township of *land including the tide lands adjoining* for the boundary on the water side is low water mark. The tide lands in dispute herein, however, did not attach to or adjoin any of the upland of the Reservation, but did attach to Smith Island. See Exhibit 3. There is a navigable channel between the tide lands in dispute and the Reservation upland;

7. An inspection of the official map of the Reservation (Exhibit 2), shows that the tide lands in dispute are not included in the Reservation;

8. The argument of counsel for the Government to the effect that because the course named in the description in the executive order of the western boundary of the Reservation is southeasterly that the boundary must run from where the line of low water mark would cease to continue in a southeasterly direction, in a "straight line" to the point of beginning, is not sound for several reasons. If the language, "thence southeasterly with the line of low water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, etc," would require a continuous southeasterly course, then the meandering of Tulalip Bay is entirely wrong, because to run around the Bay would require not only a southeasterly course but a northwesterly course. Aside from that, however, the plain language of the description in the executive order is not susceptible of the construction placed upon it by counsel for the Government. That language requires that the boundary line be run along the shore of Port Susan and the shores of Tulalip Bay and Port Gardner, *with all the meanders thereof*, to the place of beginning. By reason of the fact

that Ebey Slough empties into Port Gardner, the meanderings of that body of water would be lost before the place of beginning could be reached, and therefore, it became necessary to insert in the description contained in the executive order the direction to cross Ebey Slough. The punctuation of the description contained in the executive order shows that the words "and across the mouth of Ebey Slough," constitute a parenthetical phrase. It is true that the words are not enclosed in parenthesis, but there is a comma at each end thereof, which gives the language the same effect as though they were enclosed in parenthesis. It being true therefore that the description contained in the executive order requires the line of the water boundary of the Reservation to be run coincident with the line of low water mark along the shores of Port Susan, Tulalip Bay and Port Gardner, with all the meandering thereof, the only thing left for the court to determine is how far north towards Ebey Slough and the Kwilt Ceda creek, Port Gardner extends. If it extends north of the tide lands in question, then manifestly the plaintiff has no case. An inspection of any map in evidence or of any other map of the

locality will show that the mouth of Ebey Slough is at least a mile north of the tide lands in dispute, and will also show that Port Gardner extends a long distance north of said tide lands. Steamboat Slough is separated from Ebey Slough by land about a mile in width. The latter slough is just as important a branch of the Snohomish River and just as big as Ebey Slough. It is nearly a mile south of Ebey Slough, and the "straight line" contended for by the Government as the boundary of the Reservation does not run into Ebey Slough at all, but does run into Steamboat Slough. Manifestly therefore, the tide lands in dispute are not in the waters of Ebey Slough, but are in the waters of Port Gardner.

Defendants' Contention As To Boundary

The defendants contend that the tide lands in dispute are not in Ebey Slough or in the mouth thereof, but that they are in Port Gardner, into which Ebey Slough, Steamboat Slough, Union Slough, and the main channel of the Snohomish River empty. This contention and the reason for it we have heretofore stated. In addition to what

we have already said, we desire to call attention to Article 17 of the Constitution of the State of Washington, which provides:

“The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows.”

In the same article the state disclaims all title to all tide, swampy and overflow lands patented by the United States. The lands involved in this case have never been patented. Shortly after the admission of the state, it, by its Board of Tide Land Commissioners, surveyed and platted these lands and claimed to own them. This plat was filed for record and the United States never claimed any interest in these lands either as trustee for the Indians or otherwise for about twenty years. The state, more than twenty years ago, sold these lands to the grantor of the defendants, and it and its grantees have ever since that time paid the taxes thereon. It would seem from these facts that the United States has acquiesced in the state's claim of ownership, and in that way the parties themselves have construed

the boundary of the Indian Reservation at the point in dispute. Again, it is apparent from the treaty that the Government intended to give to the Indians thirty-six sections of upland with the adjoining tide lands, but nothing else, except Tulalip Bay, which is specifically granted, and Kwilt Ceda creek, which was also specifically granted. No other water was granted by the terms of the treaty, and it is the contention of the Government that the tide lands in question did not exist at the time of the executive order. Unless the Indians acquired by virtue of the treaty the water which formerly existed where the tide lands now are, they could not rightfully claim said tide lands. There is another point that sustains the defendants' contention that Ebey Slough does not extend as far south as the north boundary of the tide lands in dispute. Article II of the treaty refers to a bay called therein Hwhomish Bay, and described it as the water into which the Kwilt Ceda empties. The existence of a bay at that point precludes the idea that Ebey Slough extended southward as far as the north boundary of the tide lands in dispute.

Judge Neterer's Views

In the course of his decision Judge Neterer used the following language, (Trans., 19), which is so pertinent that we repeat it:

“According to the meander notes of the U. S. Government, the mouth of Ebey’s Slough is practically at X indicated upon the sketch. The testimony shows that the land in question is a part of the tidelands which extend from and adhere to Smith Island; that these lands are separated by a deep water channel on the west and north and are independent of the reservation; that Steamboat Slough, which is navigable, is north of the land, and the water of Port Gardner is west and forms a navigable channel between the reservation and the land in question entering into Ebey’s Slough. I think it must be apparent from an examination of the treaty, and likewise of the executive order, that the purpose was to grant to the Indians tillable land with such accretions as would naturally belong thereto. I do not think that it could have been the intention of the executive order to have included tide lands which were entirely separated and segregated from the uplands of the reservation. If it had been the intention to grant any special water privileges across the navigable

water upon which the reservation borders, fitting language would have been employed. A casual reading of the executive order, together with a consideration of the mouth of Ebey Slough as fixed by the United States Government notes, however, is conclusive upon the plaintiff. The mere fact that the executive order in general terms, reads, 'southeasterly' with the line of low-water mark along said shore * * * of and across the mouth of Ebey Slough to the place of beginning' cannot be read to extend across the waters of Port Gardner, but must be carried to the mouth of Ebey Slough, even though the course may not be directly southeasterly to the point of commencement."

Accretion

It is admitted that the tide lands in dispute do not adjoin the upland of the Indian Reservation. The map (Exhibit 3) shows that these tide lands adjoin Smith Island. If they were formed by accretion, then under well established principles of law they would form a part of Smith Island. If therefore, the theory suggested by the complaint to the effect that these tide lands were actually formed by alluvial deposits attaching to land out-

side the Reservation, that fact alone would defeat the plaintiff's case.

Detached Tidclands Not a Part of Reservation

Counsel for the Government in their brief under point 2, commencing at page 18, argue, that even if it be conceded that the tide lands in dispute are not within the boundaries of the Indian Reservation, they nevertheless belong to the Reservation, because they are a part of the Reservation tide lands, and because "of its ownership of the lands opposite this land on each side of the slough as one of the attributes of riparian ownership."

These propositions are so palpably unsound that it is difficult even to discuss them. A sufficient answer to the proposition that the tide lands in dispute are a part of the Reservation tide lands, even though they be outside the boundaries of the Reservation, is that it has been admitted in this suit that they do not attach to any upland of the Reservation, and therefore they cannot be a part of the Reservation tide lands, unless they lie within the boundaries of the Reservation.

The other proposition under this point stated on page 21 of the brief of plaintiff in error in these words, "finally we argue that the Government owns this triangular strip of land because of its ownership of the lands opposite this land on each side of the slough as one of the attributes of riparian ownership," is quite unintelligible, especially in view of the following admitted facts in this case:

The Snohomish River is a large navigable stream. Several miles above the property in dispute it divides into several branches. Each of these branches is a large river in itself, and they all empty into Port Gardner. One of these branches is Ebey Slough, and another is Steamboat Slough. Both of these branches empty into Port Gardner north of the tide lands in question, and their waters go out to sea through Port Gardner through a deep navigable channel lying between the main land of the Reservation west of the tide lands in dispute. The channel of Steamboat Slough continues into Port Gardner between the tide lands in dispute and the main land of the

Reservation lying northward thereof. The tide lands in dispute do not constitute an island, but attach to Smith Island, which is not a part of the Reservation. These tide lands have been formed by accretion, and they now constitute a part of Smith Island. In the Government's brief on page 19 the following statement occurs:

“This land, (the tide lands in dispute), was made by the mud and silt deposited by the slough and will undoubtedly in time become a part of the main land, by process of accretion.”

It is undoubtedly a part of the main land now, but the main land in this instance is Smith Island, and not the Indian Reservation.

Continuing their argument counsel for the Government on page 21 of their brief say: “The owners of land bordering on navigable waters are entitled to any increase of the soil by accretion.” With this statement we agree absolutely. In the instant case, however, all of the accretion has been to Smith Island.

Again counsel on page 21 of their brief say: "The owner of land on both sides of a river above tide waters owns the island therein to the extent of the length of his lands opposite to them." With this statement of the law we have no quarrel, but it has no application to the instant case. The tide waters extend up the Snohomish River for about ten miles above the location of the lands in dispute, and the lands in dispute do not constitute an island.

Counsel for the Government seem to think that at sometime in the future the deposit of silt coming down the Snohomish River will fill up the space between the upland of the Reservation and the tide lands in dispute, and that when that time arrives these tidelands will then belong to the Reservation, and that for that reason they should now be held to belong to the Reservation. The answer to that proposition is obvious.

Unlike some other states in that respect, the State of Washington has never claimed the ownership of tide lands attaching to an Indian Reservation, but on the other hand its administrative officers have always disclaimed any interest in such

tide lands. In one instance in a case cited in the brief of plaintiff in error, one Jones made application to the State of Washington to purchase certain tide lands, which were within the boundaries of the Tulalip Indian Reservation, but the state, through its land commissioners, rejected such application on the sole ground that the tide lands applied for were within the boundaries of the Reservation. The applicant appealed from this decision of the board of state land commissioners to the superior court of Snohomish County, which reversed the ruling of the state board and held that the lands applied for were subject to sale by the state. The state board appealed to the supreme court of the State of Washington, which reversed the decision of the superior court and held that detached tide lands within the boundaries of the Tulalip Indian Reservation did not belong to the state.

Jones v. Calvert, 32 Wash. 610.

The same board of land commissioners, however, held that the tide lands attached to Smith Island, including the tide lands in dispute herein,

were subject to sale and did sell them, and its grantees were in possession of them under such sale for more than twenty years before this action was commenced.

Conclusion

We submit that there is nothing in the record from which it can be reasonably inferred that the tide lands in question are within the boundaries of the Tulalip Indian Reservation; that it does appear from the record and from the facts of which the court is compelled to take judicial notice that these tide lands are not within the boundaries of the Reservation; that they do not attach to any part of the Reservation, but that they do attach to and form a part of Smith Island, which admittedly is not a part of the Reservation; and for these reasons we submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

J. A. COLEMAN,

Attorney for defendants in error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff in Error,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-partners, doing business under the name and style of Pacific Transfer Company; J. DANIELS, H. SANDGATHE, doing business as Springfield Garage; V. W. WINCHELL and F. M. HATHAWAY, co-partners doing business under the name and style of Eugene Ford Auto Company, and A. WILHELM and JOHN DOE WILHELM, co-partners doing business under the firm name and style of A. Wilhelm & Son, Defendants in Error.

TRANSCRIPT OF RECORD ON WRIT OF ERROR.

To the District Court of the United States for the
District of Oregon.

Filed

No. _____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff in Error.

vs.

E. A. FARRINGTON and L. A. HOUCK, co-
partners, doing business under the
name and style of Pacific Transfer
Company; J. DANIELS, H. SAND-
GATHE, doing business as Springfield
Garage; V. W. WINCHELL and F. M.
HATHAWAY, co-partners doing busi-
ness under the name and style of Eu-
gene Ford Auto Company, and A.
WILHELM and JOHN DOE WILHELM,
co-partners doing business under the
firm name and style of A. Wilhelm
& Son, Defendants in Error.

TRANSCRIPT OF RECORD
ON WRIT OF ERROR.

To the District Court of the United States for the
District of Oregon.

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*United States Circuit Court of Appeals for the
Ninth Circuit*

FORD MOTOR COMPANY, a corporation,
Plaintiff in Error,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-
partners, doing business under the
name and style of Pacific Transfer
Company; J. DANIELS, H. SAND-
GATHE, doing business as Springfield
Garage; V. W. WINCHELL and F. M.
HATHAWAY, co-partners doing busi-
ness under the name and style of Eu-
gene Ford Auto Company, and A.
WILHELM and JOHN DOE WILHELM,
co-partners doing business under the
firm name and style of A. Wilhelm
& Son, Defendants in Error.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

E. L. McDougal, N. W. Bank Bldg, Portland, Oregon
Platt & Platt, Platt Bldg., Portland, Oregon,
L. B. Robertson and Alfred Lucking, Detroit, Mich.,
For the Plaintiff in Error.

Logan & Smith, Portland, Oregon,
C. A. Hardy and L. Bilyeu, Eugene, Oregon,
For the Defendants in Error.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

FORD MOTOR COMPANY, a corpora-
tion,

Plaintiff in Error,

vs.

V. W. WINCHELL and F. M. HATH-
AWAY et al.,

Defendants in Error.

CITATION ON WRIT OF ERROR

United States of America,
District of Oregon, ss.

To V. W. Winchell and F. M. Hathaway,
Greeting:

You, and each of you, are hereby cited and admon-
ished to be and appear before the United States Circuit
Court of Appeals for the Ninth Circuit, at San Fran-
cisco, California, within thirty days from the date hereof,
pursuant to a writ of error filed in the Clerk's office of
the District Court of the United States for the District
of Oregon, wherein Ford Motor Company is plaintiff
in error and you are defendants in error, to show cause,
if any there be, why the judgment in the said writ of
error mentioned should not be corrected and speedy jus-
tice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District,
this 10th day of February, in the year of our Lord, one
thousand, nine hundred and seventeen.

R. S. BEAN,
Judge.

Filed February 12th, 1917.

G. H. MARSH, Clerk.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

Ford Motor Company, a corporation,
Plaintiff in Error,

vs.

V. W. Winchell and F. M. Hathaway, et al.,
Defendants in Error.

WRIT OF ERROR

The United States of America, ss.

The President of the United States of America.

To the Judge of the District Court of the United States
for the District of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between Ford Motor Company, a corporation, plaintiff, and plaintiff in error, and V. W. Winchell and F. M. Hathaway, defendants, and defendants in error, a manifest error has happened to the great damage of the said Ford Motor Company, a corporation, plaintiff, and the plaintiff in error, as by its complaint appears, we being willing that error, if any there has been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together

with this writ, so that you have the same at San Francisco, California, within thirty days from this date, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White,
Chief Justice of the United States, this 10th day of
February, A. D. 1917, and in the one hundred forty-first
year of the Independence of the United States of
America.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

Allowed by

R. S. BEAN,

United States District Judge.

Filed February 10th, 1917.

G. H. MARSH, Clerk.

Service of the foregoing Writ of Error made this
10th day of February, 1917, upon the District Court
of the United States for the District of Oregon, by filing
with me as Clerk of said Court, a duly certified copy of
said Writ of Error.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

R. S. BEAN, Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

March Term, 1916

BE IT REMEMBERED, That on the 14th day of August, 1916, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Complaint, which had been duly served upon the defendants named therein, now the defendants in error, on said date, in words and figures as follows, to-wit:

In the District Court of the United States
for the District of Oregon
AT LAW

Ford Motor Company, a corporation,
Plaintiff,

vs.

E. A. Farrington and L. A. Houck, co-partners, doing business under the name and style of Pacific Transfer Company; J. Daniels, H. Sandgathe, doing business as Springfield Garage; V. W. Winchell and F. M. Hathaway, co-partners, doing business under the name and style of Eugene Ford Auto Company, and A. Wilhelm and John Doe Wilhelm, co-partners, doing business under the firm name and style of A. Wilhelm & Son, Defendants.

AMENDED COMPLAINT

Plaintiff complains and for cause of actions, alleges:

I

That it is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Michigan, with its factory and principal place of business at Highland Park, Michigan, and duly authorized to transact business as a foreign corporation in the State of Oregon, with a factory branch and principal place of business in the State of Oregon in Portland, Multnomah County, Oregon.

II

That E. A. Farrington and L. A. Houck are co-partners doing business under the firm name and style of Pacific Transfer Company, and are engaged in the warehouse and transfer business in the City of Eugene, Oregon.

III

That H. Sandgathe is an individual doing business as the Springfield Garage, and is in the automobile business at Springfield, Oregon.

IV

That V. W. Winchell and F. M. Hathaway are co-partners, doing business as the Eugene Ford Auto

Company, and are in the automobile business at Eugene, Oregon.

V

That A. Wilhelm and John Doe Wilhelm are co-partners doing business as A. Wilhelm & Son, and are in the automobile business at Junction City, Oregon.

VI

That heretofore and on or about September 10th, 1915, plaintiff and defendants V. W. Winchell and F. M. Hathaway entered into a contract whereby said defendants were to represent the plaintiff as limited agents. Pursuant to said contract plaintiff consigned to the said defendants in this paragraph mentioned the following numbered Ford automobiles: 1115957, 1116-510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066343, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067615, Sedan 658934, 1116486.

VII

That thereafter plaintiff, pursuant to the terms of said contract with the defendants mentioned in the last preceding paragraph, duly cancelled said contract and offered \$16,077.50, the money advanced on said consign-

ment of automobiles by the above mentioned defendants to said defendants in payment and satisfaction as provided for in said contract, and that defendants then refused and ever since have refused to receive the same; that the plaintiff was at the time of said tender ready and willing and able to pay said amount thereof to the defendants, and that since said offer plaintiff has been ready, willing and able to pay the sum of thirty-four hundred and one and 12-100 dollars '(\$3401.12), which amount is the defendants' Winchell and Hathaway, property in said cars at this time, and that plaintiff now brings the said sum of thirty-four hundred and one and 12-100 dollars into this Court in this action, ready to be paid to defendants.

VIII

That the amount involved in this action is in excess of three thousand dollars, and within the jurisdiction of this Court.

IX

That at the time of the commencement of this action said automobiles above described are within the State of Oregon and the jurisdiction of this Court, and in the possession of the defendants herein; that the plaintiff is the present owner and entitled to the immediate possession of said automobiles; that demand has been made upon the defendants for the possession of said automobiles and defendants have refused to give plaintiff possession of said automobiles.

X

That said automobiles are of the value of sixteen thousand seventy-seven and 50-100 dollars (\$16,077.50).

Wherefore plaintiff demands judgment against the defendants for the recovery of Ford automobiles as particularly set forth in Paragraph VI of this complaint, or for \$16,077.50, the value thereof; \$1,000.00 damages for the detention thereof; and for the costs and disbursements of this action.

E. L. McDOUGAL,
Attorney for Plaintiff.

State of Oregon,

County of Multnomah, ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the plaintiff's attorney in the above-entitled action, and that the foregoing proposed amended answer is true as I verily believe; that I make this verification because the attorney-in-fact is without the state and I am acquainted with the facts. (Sgd)

E. L. McDOUGAL.

Subscribed and sworn to before me this 14th day of August, 1916. (Sgd) HOMER T. SHAVER,
(Seal) Notary Public for Oregon.

My commission expires July 19, 1920.

Filed August 14th, 1916.

G. H. MARSH, Clerk.

And on the 14th day of June, 1916, there was duly filed in said Court an Answer, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Ford Motor Company, a corporation,
Plaintiff,

vs.

E. A. Farrington and L. A. Houck, co-partners doing business under the name and style of Pacific Transfer Company; J. Daniels, H. Sandgathe, doing business as Springfield Garage; V. W. Winchell and F. M. Hathaway, co-partners doing business under the name and style of Eugene Ford Auto Company, and A. Wilhelm and John Doe Wilhelm, co-partners, doing business under the firm name and style of A. Wilhelm & Son, Defendants.

Come now the defendants and answering the complaint herein admit the allegations contained in Paragraph I, in Paragraph II, in Paragraph III, in Paragraph IV, and in Paragraph V of the Complaint herein.

Deny each and every other allegation contained in said complaint except as hereinafter expressly admitted, and except as hereinafter alleged.

For a further and separate answer and defense to said complaint these defendants allege that V. W. Winchell and F. M. Hathaway prior to the time of the commencement of this action had purchased all the Ford automobiles described in said complaint, and had paid the plaintiff the full purchase price required to be paid from them to plaintiff, and no further payments were to be made thereon; and, thereupon, the plaintiff delivered said automobiles to defendants and title to the same passed from plaintiff to defendants, and defendants became the owners thereof, and prior to the time of the commencement of this action, and at the time of the commencement thereof were, and are now, the owners thereof, and entitled to the immediate and exclusive possession of the said automobiles.

For a further and separate answer and defense to said complaint, the defendants V. W. Winchel and F. M. Hathaway reallege all of the allegations contained in the first separate answer contained therein, and these defendants further allege that ever since the contract mentioned in the complaint was made between plaintiff and these defendants, plaintiff has dealt with these defendants in the sale of automobiles, so that when the defendants paid to plaintiff the amount required to take up the bill of lading sent for collection by the plaintiff with the automobiles delivered by plaintiff to defendants, and paid the freight and draft attached to such bill of lading, delivery was made of said automobiles to defendants and such drafts were drawn by plaintiff against defendants for the full sum required to be paid by defendants to plaintiff as the purchase price of said automobiles, and

upon such payment and delivery plaintiffs have received said automobiles and dealt with the same as their own, with the knowledge and acquiescence of plaintiff; and the contract between plaintiff and defendants ever since the same was made has been construed by the parties, the same being the contract under which plaintiff sold and defendants purchased the said automobiles, so that upon payment of such sight drafts and the delivery of the automobiles upon the payment of the same and the freight, title and delivery to such automobiles was completed and passed from plaintiff to defendants and that all of the automobiles mentioned in the complaint were purchased from plaintiff and paid for by defendants upon the terms hereinafter set forth; and long prior to the institution of this action, and not otherwise; and that at the time of the commencement of this action and for a long time prior thereto defendants were and are the exclusive owners of said automobiles and each one of the same and entitled to the immediate and exclusive possession thereof, and were in the lawful possession thereof at the time of the commencement of this action.

For a third further and separate answer and defense these defendants allege the truth to be: That prior to the commencement of this action and on or about the 29th day of May, 1916, the plaintiff and the defendants V. W. Winchell and F. M. Hathaway had a settlement of the contract existing between plaintiff and defendants wherein and whereby the plaintiff and defendants adjusted their mutual accounts and reciprocal claims, and wherein and whereby the plaintiff agreed that the defendants were the owners of and did convey to defend-

ants V. W. Winchell and F. M. Hathaway all claims of title on the part of plaintiff to the automobiles described in the complaint and each and every one thereof, and relinquished every claim of possession to the said automobiles and each and every one thereof.

For a fourth further and separate answer and defense and counterclaim the defendants V. W. Winchell and F. M. Hathaway allege that during all the time mentioned herein they were, and are now, co-partners doing business under the firm name and style of Eugene Ford Auto Company, and had duly registered their assumed business name with the County Clerk of Lane County, Oregon, and were engaged in a general automobile business in Lane County, Oregon, and engaged in buying and selling Ford automobiles, parts, fixtures, accessories, supplies and materials used in said business and incident thereto.

That at the time of the commencement of this action these defendants were, and are now, the owners of the Ford automobiles mentioned in the complaint and being automobiles numbered and specifically designated in Paragraph VI of the complaint, and being Ford automobiles: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062232, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

That said automobiles were and are of the value of

\$493.25 for each of said cars, except for the Sedan which was and is of the value of \$798.25.

That defendants at the time of the commencement of this action, as such owners of said automobiles, were entitled to the immediate and exclusive possession of the same; and on or about Monday, the 5th day of June, 1916, the plaintiff instituted the above cause and wrongfully and unlawfully and maliciously caused the Writ of Replevin to be issued out of this Court and filed an affidavit and bond thereon and demanded immediate possession of the said automobiles; and at the said time the plaintiff well knew that said automobiles, and each and every one thereof, were the exclusive property of these answering defendants, V. W. Winchell and F. M. Hathaway; and that said defendants were entitled to the immediate and exclusive possession thereof, and plaintiff caused said Writ of Replevin to be issued herein and the said automobiles to be seized maliciously, wrongfully and unlawfully for the purpose of destroying the business of these defendants and injuring their financial standing and credit and depriving them of said property of the value of \$18,555.25, as aforesaid, and to drive them out of business and to prevent them from conducting their automobile and garage business hereinbefore described.

That at said time these defendants had an established business in dealing in automobile accessories, appurtenances and supplies from which they were then making and had been making for several months last past a regular profit of approximately Three Hundred Dollars per month.

That by the wrongful acts of the plaintiff, as herein alleged, the business of these defendants has been destroyed, their business credit ruined, their standing in the mercantile world has been discredited and they have been injured and damaged by the malicious acts of defendants, as alleged, to the sum of Twenty-five Thousand Dollars, in addition to the general damages hereinbefore set forth, to-wit: value of the automobiles and the property aggregating \$18,555.25.

That the plaintiff is a corporation of great wealth and extensive business associations and power in the commercial world, and in committing the acts herein set forth, it has used its wealth, standing and power to harass and annoy these defendants by the issuance of legal process to which plaintiff knew it was not entitled.

WHEREFORE, defendants demand judgment that the defendants V. W. Winchell and F. M. Hathaway have judgment against the plaintiff for the recovery of the Ford automobiles, as particularly set forth in the answer herein, or for \$18,555.25, the value thereof; and for Twenty-five Thousand Dollars damages; and for their costs and disbursements in this action.

I. N. SMITH, L. BILYEU AND THOMPSON &
HARDY, Attorneys for Defendants.

STATE OF OREGON
COUNTY OF LANE—ss.

I, V. W. Winchell, being first duly sworn, depose and say that I am one of the defendants in the above en-

titled action; and that the foregoing answer is true as I verily believe. **V. W. WINCHELL.**

Subscribed and sworn to before me this 13th day of June, 1916. **HELMUS W. THOMPSON,**
(Notarial Seal) Notary Public for the State of Oregon.

My commission expires March 27, 1917.

Filed June 14, 1916. **G. H. MARSH,** Clerk.

And on the 28th day of July, 1916, there was duly filed in said court a Reply to the Answer, in words and figures, as follows, to-wit:

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.**

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington, and L. A. Houck,
co-partners, doing business under the
name and style of Pacific Transfer
Company, J. Daniels, H. Sandgathe,
doing business as Springfield Garage,
V. W. Winchell and F. M. Hathaway,
co-partners, doing business under the
name and style of Eugene Ford Auto
Company, and A. Wilhelm and John
Doe Wilhelm, co-partners, doing busi-
ness under the firm name and style of
A. Wilhelm & Son, Defendants.

Comes now the plaintiff, Ford Motor Company, a corporation, and for reply to the first further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the second further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the third further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

And plaintiff, replying to the fourth further and separate answer and defense of the defendants, denies the same, and the whole thereof, except as to the matters therein contained which are substantially pleaded in plaintiff's complaint on file herein.

WHEREFORE, plaintiff having fully replied to the further and separate answers and defenses of the defendants, prays judgment as heretofore asked for in the complaint on file herein.

E. L. McDOUGAL,
Attorney for Plaintiff.

STATE OF OREGON
COUNTY OF MULTNOMAH—ss.

I, E. L. McDougal, being first duly sworn, depose and say that I am the attorney for plaintiff corporation

in the above entitled action, that the foregoing reply is true as I verily believe. I further state that I have personal knowledge of the facts herein contained and verify this reply for the reason that the proper officer for service of this corporation is not now within the State.

(Sgd.) E. L. McDOUGAL.

Subscribed and sworn to before me this 28th day of July, 1916.

(Sgd.) F. C. McDOUGAL,

(Seal)

Notary Public for Oregon.

My commission expires July 1, 1920.

AND AFTERWARDS to-wit: On the 6th day of September, 1916, there was duly filed in said court a verdict in words and figures, as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Car Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington and L. A. Houck,
co-partners, as Pacific Transfer Com-
pany; J. Daniels, H. Sandgathe; V.
W. Winchell and F. M. Hathaway, co-
partners as Eugene Ford Auto Com-
pany, and A. Wilhelm and John Doe
Wilhelm, co-partners, as A. Wilhelm
& Son, Defendants.

We, the jury, duly empanelled and sworn to try the above cause, find our verdict for the defendants; and, that the defendants, V. W. Winchell and F. M. Hathaway, co-partners doing business as Eugene Ford Auto Company, were at the time this action was commenced and are now entitled to the immediate possession and are entitled to the return of the Ford automobiles described in the complaint and the answer herein and being the following numbered Ford automobiles, to-wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062280, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486, and in case a return cannot be had we find the value of the said automobiles to be \$16,077.50, and single damages sustained by the defendants, V. W. Winchell and F. M. Hathaway, partners as aforesaid, to be the sum of \$6000.00. GEORGE KEECH, Foreman.

AND AFTERWARDS, to-wit, on Monday, the 11th day of September, 1916, the same being the 60th judicial day of the regular July term of said court; present: the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

JUDGMENT

Thereupon, on motion of said defendants for judgment on the verdict heretofore filed and entered herein,

IT IS CONSIDERED that said defendants, V. W. Winchell and F. M. Hathaway, co-partners doing business as the Eugene Ford Auto Company, do have and recover of and from the plaintiff, Ford Motor Car Company, a corporation, the immediate possession and return of the Ford automobiles described in the complaint and answer herein, and being the following numbered Ford automobiles, to-wit: 1115957, 1116510, 1115933, 1068830, 1067382, 1115500, 1115791, 1115931, 1115943, 1115941, 1116479, 1062282, 1116461, 1067484, 1116008, 1066396, 1116459, 1079104, 1079064, 1078975, 1079033, 1066345, 1078972, 1017449, 1078965, 1078948, 1067359, 1067377, 1067426, 1008770, 1079019, 1079020, 1067411, 1068781, 1067415, Sedan 658934, 1116486.

AND IT IS FURTHER ORDERED that in case return of said automobiles cannot be had that said defendants, V. W. Winchell and F. M. Hathaway, co-partners, doing business as the Eugene Ford Auto Company, do have and recover of and from the said plaintiff, Ford Motor Car Company, a corporation, the sum of \$16,077.50, the value of the said automobiles, and

IT IS FURTHER CONSIDERED that said defendants, V. W. Winchell and F. M. Hathaway, co-partners, doing business as the Eugene Ford Auto Company, have and recover of and from the said plaintiff, Ford Motor Car Company, a corporation, damages in the sum of \$6000.00 together with costs and disbursements herein taxed at \$68.55,

Whereupon, on motion of said plaintiff,

IT IS ORDERED that it be and it is hereby allowed thirty days from this date within which to file a motion to set aside said judgment and for a new trial herein, and in which to submit a Bill of Exceptions, and

IT IS FURTHER ORDERED that issuance of execution upon the said judgment be stayed until after the termination of the said motion for new trial.

R. S. BEAN, United States District Judge.

Filed September 11, 1916. G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 8th day of November, 1916, there was duly filed in said court a petition for new trial in words and figures, as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington, V. W. Winchell
and F. M. Hathaway, et al,
Defendants.

COMES NOW the plaintiff in the above entitled action appearing by Messrs. Platt & Platt and E. L. McDougall, its attorneys of record, and petitions the court for a new trial in the above entitled action and for grounds of such petition alleges:—

I.

That it appears from the undisputed testimony introduced upon the trial of the above entitled cause that the plaintiff was compelled to and did pay to The First National Bank of Eugene, Oregon, three notes of the defendants, V. W. Winchell and F. M. Hathaway, aggregating the sum of \$12,676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above entitled action, which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to maintain an action for the replevin of said automobiles, and the court failed and refused to instruct the jury at the trial of the above entitled action that the plaintiff was entitled to off-set the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above entitled action upon the further ground that the verdict of the jury made and entered in the above entitled action, and the judgment entered thereon contravenes the instructions given by the court upon the trial of the above entitled cause in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of \$16,077.50, and said judgment is contrary to

the evidence introduced upon the trial of the above entitled cause in that it appears from the undisputed evidence introduced upon the trial of the above entitled cause and the law applicable to the facts proven as evidenced by the instructions of the court made upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its right to the possession of the automobiles in controversy, and that no evidence was introduced upon the trial of the above entitled cause upon which any claim for damages for the sum of \$6000, or any sum in excess of \$2414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the defendants, V. W. Winchell and F. M. Hathaway, had sold their business to a third party at or about the time of the cancellation of their contract with the plaintiff in the above entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above entitled cause.

IV.

Plaintiff further petitions the court for an order modifying the judgment entered in the above entitled cause on the . . day of September, 1916, by off-setting against the sum of \$16,077.50 therein awarded to the defendants in lieu of the machines sought to be replevied in the above entitled action the sum of \$12,676.38, being the amount of money paid by the plaintiff to The First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to the First National Bank of Eugene, Oregon, as payee, each of which said notes were secured by a chattel mortgage upon the automobiles sought to be replevied in the above entitled action, which facts appear from the undisputed evidence introduced upon the trial of the above entitled cause, and for grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defendants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of \$2800 bearing date April 22nd, 1916; the second note being in the sum of \$2800 bearing date of May 1st, 1916, and the third note being in the sum of \$8400 bearing date May 24th, 1916, each of which notes was secured by a chattel mortgage upon the property sought to be replevied in the above entitled action, in order to free the property involved in the above entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this court modifying the judgment heretofore entered in the above entitled cause on the . . . day of September, 1916, by striking therefrom the sum of \$6000 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because, it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants, V. W. Winchell and F. M. Hathaway, and that no evidence was issued upon the trial of the above entitled cause upon which any claim or judgment for damages in the sum of \$6000 could properly be based, and that such allowance of \$6000 for damages, or any other sum in excess of \$2414.75 is in contravention of the instructions of the court directing the jury that they should not allow the value of the machines in controversy and at the same time allow any claim for loss of profits arising from an inability to sell said automobiles, and upon the further grounds that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the business

of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendant's contract with the plaintiff in the above entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and
E. L. McDOUGAL,
Attorneys for Plaintiff.

Filed 8th day of November, 1916.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on Tuesday the 2nd day of January, 1917, the same being the 49th judicial day of the regular November term of said court, present: the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard upon motion of the plaintiff for new trial herein, and for an order modifying the judgment heretofore entered in this cause, and was argued by Mr. Hugh Montgomery of counsel for plaintiff, and by Chas. H. Hardy of counsel for said defendants, on consideration whereof

IT IS ORDERED AND ADJUDGED that each of said motions be and the same is hereby denied, and on motion of said plaintiff

IT IS FURTHER ORDERED that said plaintiff be and it is hereby allowed ten days from this date within which to submit a Bill of Exceptions, herein.

Filed January 2nd, 1917.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said court a Petition for Writ of Error, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington and L. A. Houck,
co-partners doing business under the
name and style of Pacific Transfer
Company, J. Daniels, H. Sandgathe,
doing business as Springfield Garage;
V. W. Winchell and F. M. Hathaway,
co-partners, doing business under the
name and style of Eugene Ford Auto
Company, and A. Wilhelm and John
Doe Wilhelm, co-partners, doing busi-
ness under the firm name and style of
A. Wilhelm & Son, Defendants.

PETITION FOR WRIT OF ERROR.

Ford Motor Company, a corporation, plaintiff in the above entitled cause, conceiving itself aggrieved by the final order and judgment of this court made and entered against it and in favor of the defendants on the 11th day of September, 1916, and rulings and instructions in said cause made as set forth in its Assignment of Errors herein filed, petitions said court for an order allowing said plaintiff to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said Writ of Error, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals, and relative thereto plaintiff respectfully shows:

That by reason of the premises plaintiff alleges manifest error has happened to the great damage of the Ford Motor Company, a corporation, plaintiff herein.

That plaintiff has filed herewith its Assignment of Errors upon which it relies and will urge in the said appellate court;

Wherefore, plaintiff prays that a Writ of Error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, to this court, for the correc-

tion of the errors so complained of, and that transcript of the records, proceedings, papers and all things concerning the same upon which said judgment was made, duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that plaintiff recover judgment as demanded in its complaint.

PLATT & PLATT,

Attorneys for Plaintiff.

G. H. MARSH, Clerk.

Filed February 10th, 1917.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, present: The Honorable R. S. Bean, the United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.**

Ford Motor Company, a corporation,
Plaintiff,

—vs—

E. A. Farrington and L. A. Houck,
co-partners, doing business under the
name and style of Pacific Transfer
Company; J. Daniels, H. Sandgathe,
doing business as Springfield Garage;
V. W. Winchell and F. M. Hathaway,
co-partners doing business under the
name and style of Eugene Ford Auto
Company, and A. Wilhelm and John
Doe Wilhelm, co-partners doing busi-
ness under the firm name and style of
A. Wilhelm & Son, Defendants.

**ORDER ALLOWING WRIT OF ERROR,
STAYING PROCEEDINGS AND FIX-
ING THE AMOUNT OF BOND.**

This 10th day of February, 1917, came the plaintiff, above named, Ford Motor Company, appearing by Messrs. Platt & Platt, its attorneys of record and filed herein and presented to the court its petition praying for the allowance of a Writ of Error from the decision and judgment of this court, made and entered herein on the 11th day of September, 1916, in favor of V. W. Winchell and F. M. Hathaway, the defendants above named and against said plaintiff, and the rulings and instructions made upon the trial of the above entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit, to this court, together with its Assignment of Errors intended to be urged by it within due time, and also praying that a transcript of the record and proceedings and papers upon which the said judgment herein was rendered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which plaintiff shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises,

NOW THEREFORE, on consideration thereof, this court does allow said Writ of Error upon said plain-

tiff filing with the Clerk of this court a good and sufficient Bond in the sum of Thirty Thousand (\$30,000) Dollars; to the effect that if the said plaintiff, Ford Motor Company, shall prosecute the said Writ of Error to effect and answer all damages and costs if plaintiff fails to make its complaint good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the court, and it is ordered that all further proceedings in this court be, and the same are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals, and that said Bond shall operate as a Supersedeas Bond. R. S. BEAN, Judge.

Dated this 10th day of February, 1917.

Filed February 10th, 1917.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said court a Supersedeas Bond, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff,

—vs—

V. W. Winchell and F. M. Hathaway,
et al. Defendants.

BOND ON WRIT OF ERROR
and
SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, the **FORD MOTOR COMPANY**, a corporation, principal, and **AMERICAN SURETY COMPANY OF NEW YORK**, a corporation, surety, are held and firmly bound unto **V. W. WINCHELL** and **F. M. HATHAWAY**, the above named defendants, in the sum of **THIRTY THOUSAND DOLLARS (\$30,000.00)**, to be paid to the said **V. W. Winchell** and **F. M. Hathaway**, their executors and assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors or assigns, firmly by these presents.

Sealed with our seals and dated this 10th day of February, 1917.

WHEREAS, the above-named Ford Motor Company, a corporation, is prosecuting a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States for the District of Oregon, entered on the 11th day of September, 1916.

NOW, the consideration of this obligation is such that if the above named Ford Motor Company, a corporation, shall prosecute said Writ of Error to effect, and answer all costs and damages if it shall fail to make

good its complaint, then this obligation to be void; otherwise to remain in full force and effect.

FORD MOTOR COMPANY,

By E. L. McDougal, Attorney.

AMERICAN SURETY CO. OF NEW YORK.

By W. J. Lyons, Resident Vice President.

(Seal) Attest: W. A. King, Resident Asst. Sec.

W. J. Lyons, Agent.

Examined and approved this 10th day of February,
1917.

R. S. BEAN, Judge.

Filed February 10th, 1917.

G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said court an Assignment of Errors, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff,

—vs—

V. W. Winchell and F. M. Hathaway,
et al., Defendants.

ASSIGNMENT OF ERRORS

COMES NOW the plaintiff above named, appearing by Messrs. Platt & Platt, its attorneys of record, and

says that the judgment and final order of this court made and entered in the above entitled cause on the 11th day of September, 1916, in favor of the defendants, V. W. Winchell and F. M. Hathaway, defendants above named and against said plaintiff, is erroneous and against the just rights of said plaintiff, and files herein, together with its petition for a writ of error from said judgment and order, the following assignment of errors, which it avers occurred upon the trial of said cause:

I.

The above entitled court erred in instructing the jury that the plaintiff did not make a sufficient payment or tender to the defendants of the amount of money which the defendants had advanced upon the automobiles in controversy, and in further instructing the jury that on account of the insufficiency of such payment or tender, the plaintiff was not entitled to the possession of the cars in controversy, and in disregarding plaintiff's exception to the action of the court in so instructing the jury, which instruction was as follows:

"The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it

had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had."

II.

The above entitled court erred in refusing to instruct the jury that payment to the defendants of the advancements made by the defendants on the automobiles in controversy by the plaintiff was not necessary before instituting the above entitled action if the defendants informed the plaintiff, or led the plaintiff to believe that they would not accept such payment, which instruction was requested by the plaintiff in writing, and was designated Plaintiff's Requested Instruction No. "IV," which instruction was as follows:

"I instruct you that payment to defendants of advancements on said automobiles by defendants before taking possession of the

same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment."

III.

The above entitled court erred in instructing the jury that it was for the jury to determine whether or not the taking of the automobiles in question from the possession of the defendants destroyed or injured the business of the defendants, and to what extent such business was so destroyed or injured, which instruction was as follows:

"Now the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of those thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent if you can arrive at that conclusion. They allege in their answer that their business was paying an income of \$300.00 a month and that they were deprived of that income by reason of the wrongful acts of the plaintiff company. Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants of course deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that of

course was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would of course be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages. Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture but upon the facts and circumstances of the case as disclosed by the testimony."

IV.

The above entitled court erred in refusing to instruct the jury that the burden rested upon the defendants to prove by a preponderance of the evidence that they had been specially damaged by the action of the plaintiff in taking possession of the automobiles in controversy, which instruction was requested in writing by the plain-

tiff, and was known as Plaintiff's Requested Instruction No. "XI," which requested instruction was as follows:

"The burden is upon the defendants to prove by a preponderance of the evidence, that the automobiles here in question are of the value they allege, namely \$18,555.25, and that they have been further specially damaged in the sum of \$25,000.00, and unless defendants do convince you by a preponderance of the evidence, to this effect, then they have failed and your verdict should be against them."

V.

The above entitled court erred in refusing to instruct the jury that the defendants had failed to prove damages in the case, and that the only question before the jury for decision was to determine who were the owners and entitled to the possession of the automobiles in controversy, which instruction was requested by the plaintiff in writing, and was known as Plaintiff's Requested Instruction "B," which requested instruction was as follows:

"I instruct you that the defendants have failed to prove damages in this case and that the only question for you to decide is who are the owners and entitled to the possession of the automobiles in question and their value."

VI.

The above entitled court erred in sustaining the defendants' motion to take from the consideration of the

jury all of the evidence offered by the plaintiff as to the payment to The First National Bank, of Eugene, Oregon, of the amount of certain liens imposed upon the automobiles in controversy by the defendants in favor of the said First National Bank, of Eugene, Oregon, and in refusing to instruct the jury that the plaintiff was entitled to an offset against any claim of the defendants in the amount of money paid to the said First National Bank of Eugene, Oregon, to remove the liens imposed upon the automobiles in controversy by the defendants in the above entitled action.

VII.

The above entitled court erred in ruling upon the trial of the case that the evidence showed that the plaintiff had failed to return the advances made upon the automobiles in question, or to tender such advances to the defendants, which ruling was as follows:

“COURT: As I interpret this contract, for the purpose of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale. In any event, the contract provided that the Ford Motor Company might recover possession of them in case the contract was cancelled upon returning the advances, but before it could recover, it must return the advances or at least tender them, and the evidence in this case shows it did neither—it did not return the advances nor did it tender the money. All the evidence is Mr. Goden said

he had the money in the bank but never offered to pay it—never gave the defendants any opportunity to accept it, but proceeded to institute this action without complying with their contract, and therefore I think as far as that feature of the case is concerned the defendants are entitled to a ruling instructing the jury to return a verdict in their favor for possession of this property.”

VIII.

The above entitled court erred in directing a verdict in favor of the defendants and against the plaintiff to the effect that the defendants were entitled to a return of the automobiles in controversy, and in instructing the jury that the plaintiff did not tender to the defendants the amount of the advances upon said automobiles, or any other amount, and was, therefore, not entitled to possession of the cars at the time the action was brought, and in further instructing the jury that under the law they should find a verdict in favor of the defendants to the effect that such defendants were entitled to a return of the cars, or their value, in case such a return could not be had, which instruction was as follows:

“The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted

by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore, it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought, and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had."

IX.

The above entitled court erred in sustaining defendants' motion for a directed verdict on the ground that the plaintiff had made no demand for the possession of the automobiles in controversy prior to the institution of this action, and in failing to instruct the jury that such a demand was unnecessary in the above entitled action, which requested instruction was as follows:

"I instruct you that the plaintiff, Ford Motor Company, under its contract with defendants, had the right to cancel, by registered letter

the Limited Agency Contract with defendants at any time and without cause, and retake possession of any unsold automobiles in the possession of any unsold automobiles in the possession of the defendants, at the same time returning defendants advancements on said automobiles."

X.

The above entitled court erred in refusing to instruct the jury that the contract between the plaintiff and defendants was a Consignment Contract, which instruction was requested in writing, and designated Plaintiff's Requested Instruction No. "VI," which instruction is as follows:

"I instruct you that the Limited Agency Contract between plaintiff and defendants, Ford Auto Company, is a Consignment Contract and that by virtue of said contract plaintiff upon returning or offering to return the advancements made on the consigned automobiles in question, was entitled to the immediate possession of said automobiles."

XI.

The above entitled court erred in instructing the jury that 85% of the list price was all that defendants were expected or required to pay under the contract, which instruction was as follows:

“It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff upon which they had paid 85% of the list price, or all that they were expected or required to pay under the contract.”

For the reason that it appears from the face of the contract introduced in evidence upon the trial of the above entitled cause, and which contract was admitted by all parties, that the 85% of the list price was only a portion of the consideration which the plaintiff and purchasers of its cars was to receive from the defendants in this case, and for the further reason that it was provided under and by virtue of the terms of said contract that upon the cancellation thereof the plaintiff might exercise its option to retake possession of the cars in controversy upon returning the 85% advanced, and in event of its failure to exercise such option, the defendants would make every reasonable effort to sell such cars within three months after cancellation of the contract, and in event of their inability to accomplish such sale said defendants would be entitled to purchase said automobiles by the payment of ten per cent additional of the list price, and would have a lien upon the automobiles for the 85 per cent advanced.

XII.

The above entitled court erred in over-ruling and not sustaining plaintiff's motion for a modification of the judgment entered in the above entitled action by which

motion the plaintiff requested the court to offset against the judgment entered in the above entitled cause the sum of \$12,676.38, being the amount of money paid by the plaintiff to the First National Bank, of Eugene, Oregon, for the benefit of defendants, in payment and discharge of the liens imposed by the defendant upon the automobiles in controversy, and to further modify said judgment by eliminating therefrom the \$6000.00 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles, because no evidence was introduced upon the trial of said cause showing that the defendants had been specially damaged in the sum of \$6000.000, or any sum, and for the further reason that the plaintiff had a legal right to, and did, terminate its contract with the defendants, and that the undisputed evidence established that the defendants V. W. Winchell and F. M. Hathaway had sold their business to a third party prior to the cancellation of the contract with the Plaintiff.

WHEREFORE the said plaintiff and plaintiff in error prays that the judgment of said court be reversed, and such directions be given that full force and efficacy may inure to the plaintiff by reason of the cause of action set up in its amended complaint filed in said cause, and that judgment be entered in favor of the plaintiff in accordance with the demand of its amended complaint filed in said cause.

PLATT & PLATT,

Attorneys for Plaintiff.

Filed February 10th, 1917. G. H. MARSH, Clerk.

AND AFTERWARDS, to-wit, on the 10th day of February, 1917, there was duly filed in said Court a Bill of Exceptions, in words and figures as follows:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Ford Motor Company, a corporation,
Plaintiff,

vs.

E. A. Farrington, V. W. Winchell, and
F. M. Hathaway, et al., Defendants.

BILL OF EXCEPTIONS

BE IT REMEMBERED, that on the 5th day of September, 1916, at the regular term of the above-entitled Court, held at the City of Portland, State of Oregon, the above-entitled cause came on for trial before the Honorable Robert S. Bean, Judge presiding, when the following proceedings were had, to-wit:

Frederick B. Norman, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. Mr. Norman, what was your position with the Ford Motor Company on or about the months of May and June, 1916?

A. Local manager for this territory.

Q. Your headquarters at what town?

A. Portland.

Q. As local manager, will you state whether or not the territory of Lane County, Oregon, was embraced in this district?

A. It was.

Q. Are you acquainted with Mr. Winchell and Mr. Hathaway, the defendants in this case?

A. I am.

Q. Will you state in what capacity, if any, they represented the Ford Motor Company at Eugene?

A. Agents.

Q. Here is a contract. Will you identify it and see if it is the signature of yourself?

A. Yes, sir.

Q. And Mr. Winchell and Mr. Hathaway?

Contract offered in evidence, received without objection and marked PLAINTIFF'S EXHIBIT 1.

PLAINTIFF'S EXHIBIT 1.

1915—LIMITED AGENCY CONTRACT—1916

THIS AGREEMENT, made at Highland Park, Michigan, this 10th day of September, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party, and Eugene Ford Auto Co., of Eu-

gene, in the State of Oregon, hereinafter known as the second party, **WITNESSETH:**

WHEREAS the first party is the manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

WHEREAS the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

NOW, THEREFORE, this witnesseth:

APPOINTMENT AS LIMITED AGENT

(1) That first party hereby appoints second party its "Limited Agent" with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS

(2) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

AUTOS ON CONSIGNMENT

(3) That first party will consign its Ford automobiles to second party to be sold to users only, and

not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

TERRITORY

(4) The second party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely:

The entire territory, including that of the Sub-Limited Agents, shall consist of the following, namely:

(4) All of Lane County except extreme Western portion of townships in R-10-W, R-11-W, and R-12-W; portion of Douglas County Tier, T-19-S in R-6-W to R-9-W; Tier T-20-S R-4-W to R-9-W; Tier T-21-S, R-4-W to R-9-W inclusive. Portion Lane County as follows: T-15-S R-9-W, T-16-S R-8-W, T-16-S R-9-W, Tier of (288 cars) T-15-S R-1-W and R-1-E to R-8-E; Tier T-16-S, R-1-W to R-3-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier (170 cars) T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier T-18-S R-1-E to R-7-E inclusive. Tier T-19-S R-1-E to R-7-E inclusive. T-19-S R-7-W north half of T-18-S R-1 and 2 W. Portion of Northern part of Douglas County, being townships lying north of Tier T-22-S within Ranges 4-W to 9-W, southern

part of Lane County lying south of Tier T-19-S; also Tier T-19-S in R-1-W to R-6-W inclusive. The southern half of T-18-S R-1-W and T-18-S in R-2-W, Tier T-15-S and Tier T-16-S in R-4-W to R-7-W inclusive, also the town of Springfield. (118 cars)

The retail territory, that is, the territory wherein second party arranges direct sales (and in which no Sub-Limited Agents are appointed) consists of the following, namely:.....

.....

The remainder of said entire territory shall be known as wholesale territory wherein shall be appointed Sub-Limited Agents as hereinafter provided, namely:.....

.....

RESIDENCE DEFINED

In this connection, it shall be construed that a purchaser resides at either (a) his legal domicile; (b) the place where he sojourns for not less than three consecutive months; (c) his permanent place of business or occupation; or (d) either home where more than one is maintained. The decision of the first party in all violations of this sub-division shall be final and conclusive, with no recourse or appeal on the part of the second party.

DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS

(5) The sales of Ford automobiles to residents outside of second party's own territory is a serious trespass upon the rights and earnings of other Limited Agents and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, and therefore, for any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of Two hundred fifty dollars (\$250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

PRICES

(6) Second party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 Dollars (\$53.25) for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List price" are used

herein they mean the latest retail selling price established or fixed by the first party.

SALES OF AUTOS FOR CASH ONLY

(7) Second party shall arrange all sales of Ford automobiles for cash only; but if second party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own account solely, and he must remit cash only to first party.

REBATES FORBIDDEN

(8) Second party will not render any services or supply any goods either gratis or at reduced prices, nor do or permit any act whatsoever either directly or indirectly, or through other parties, that would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, plus freight and delivery charges, and said United States tax or excise, if any, and in the event of a breach or violation hereof, second party shall pay to the first party the sum of Two hundred fifty dollars (\$250.00) for every such breach or violation as and for liquidated damages arising to the first party and its business by reason of such breach or violation, or the same sum may be deducted from any moneys in first party's hands belonging to second party or which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

CHANGES IN PRICES

(9) The first party may change the list prices of any of its products at any time it may choose, and second party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices, first party shall not be bound to make any allowance to second party in cases of automobiles shipped before such changes take effect, and the second party's commission on automobiles as yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price; provided, that in case of a reduction in price the first party will allow to second party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the second party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

ADVANCES

(10) Second party shall advance in cash to first party eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles by first party to second party.

FREIGHT

(11) Second party shall pay the freight from Detroit or branch factory and advance freight, if any, as the case may be, to second party's place of business.

TITLE OF AUTOS

(12) First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

LIEN FOR ADVANCES—INSURANCE

(13) Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and he shall keep and maintain insurance so as to protect himself against loss.

RETAIL BUYERS' ORDERS

(14) Second party shall take from each proposed purchaser of a Ford automobile and immediately forward to first party, a written order duly signed by him, upon the regular blank "Retail Buyer's Order," furnished by first party, without alterations or changes except the filling in of blanks, and second party will make

no arrangement for the sale of a Ford automobile without taking such written signed order.

DEPOSITS ON AUTOS

(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with the Retail Buyer's Order to the first party, who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

COMPANY MAY REJECT ORDERS

(16) The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

WEEKLY REPORTS OF BUSINESS

(17) The second party shall report each week to first party all Ford automobiles contracted for by him with purchasers under this agreement, including all sales by Sub-Limited Agents and their purchasers, giving

motor number and description of each automobile sold or contracted for, the date of sale and full name and address of each purchaser.

WARRANTY

(18) Second party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyer's Order and Bill of Sale in that behalf. Second party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party will contain the only warranties of parts or accessories made by first party.

REPRESENTATIONS

(19) The second party shall make no representations as to Ford automobiles or parts or accessories, except the same as are set forth in the printed literature issued by the first party. If second party violates these provisions he may be personally liable, but shall not in any wise bind the first party.

CLAIMS AGAINST CARRIERS

(20) In case of damage to automobiles by carriers in transit to second party, collection from the carrier shall be made in the name of the first party as the owner of such automobiles—but as between the parties hereto, the second party shall be entitled to eighty-five per cent

(85%) of the amounts realized, less the like proportion of expenses of collection, or the first party may, at its option, assign to second party all its claims in such matter, whereupon second party shall present and prosecute his own claim without any liability of the first party, and it is stipulated that first party shall not be liable to the second party for any injury or damage to the automobile after it is once delivered to the carrier or for any return of the advances thereon.

KEEP PLACE OF BUSINESS

(21) That second party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Eugene for the purpose of conducting such Limited Agency business, and shall employ competent and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall second party have any authority to render first party responsible for the rent, taxes, wages, or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

THEFT OR DAMAGE TO AUTOS. WILL SELL ALL AUTOS. CLAIMS BY THIRD PERSONS

(22) Second party shall safely keep and he hereby agrees to save first party harmless against them for dam-

age of any kind to said Ford automobiles while in his possession under consignment, and in consideration of his being granted this agency, he expressly agrees that he will bear all damages or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while in his possession, or while in transit from first party to second party. Inasmuch as first party bases its output and expenditures upon the orders given by its Limited and Sub-Limited Agents, therefore, and in consideration of this contract the second party hereby agrees to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, of all the automobiles consigned and delivered to him pursuant to his orders for the same, and first party shall not be liable to return to second party his advances on same. The second party also agrees to save first party harmless against any and all claims made against first party by any person or persons not parties hereto for damages arising out of the conduct of second party's said business or Limited Agency whether from accident or injury or collision or loading or unloading or driving or theft or fire or from any cause of any and every nature whatsoever.

TAXES

(23) The second party shall, as a part of the expenses of his business, pay any taxes that may be levied upon or against or on account of such business or his stock, or of any of such automobiles as may be in his position or in transit on bill of lading, or otherwise, for delivery to him.

SIGNS, ADVERTISEMENTS

(24) The second party agrees to conspicuously display signs on and in his building and windows, designating that he is the "Limited Agent for Ford cars" for the territory specified herein and he shall advertise the first party's product effectively in the local papers and give his immediate and careful attention to all inquiries, and give good representation to all interests of first party in the territory aforesaid. Second party agrees not to advertise or trade in the first party's product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sub-Limited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of second party is cancelled or terminated he agrees to remove all such signs and cease such advertising.

REPAIRS, NUMBER PLATES, ETC.

(25) Second party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number, or other numbers or marks affixed to any Ford automobile, or suffer the same to

be done, and that he will not materially change any automobile consigned to him by the first party.

DEMONSTRATOR

(26) Second party agrees to purchase from first party for himself and keep in use at all times at least one Ford automobile of the current year's model, for the sole purpose of demonstration and exhibition to intending purchasers and to maintain same in proper running condition and good, clean order and repair at all times. If he sells said automobile before the same has been in actual use three months, second party agrees that he will sell the same at the full advertised list price only, and within his own territory only, as provided in sub-divisions four, six and eight hereof. For any breach of this provision the second party shall pay to first party Two hundred fifty dollars (\$250.00) as reasonable liquidated damages. The only warranty of such demonstrating or service cars by the first party is agreed to be the same as that given by first party on automobiles sold to the general public and which is printed on the Retail Buyer's Order.

PATENTS

(27) First party owns, and the Ford automobiles are manufactured under, and embody the following letters patent of the United States or some of them, namely:

United States letters patent No. 747,909 issued December 22, 1903.

United States letters patent No. 773,934 issued November 1, 1904.

United States letters patent No. 787,908 issued April 25, 1905.

United States letters patent No. 847,405 issued March 19, 1907.

United States letters patent No. 879,757 issued February 18, 1908.

United States letters patent No. 1,005,186 issued October 10, 1911.

United States letters patent No. 1,012,620 issued December 26, 1911.

United States letters patent No. 1,044,038 issued November 12, 1912.

United States letters patent No. 1,066,729 issued July 8, 1913.

United States letters patent No. 1,073,569 issued September 16, 1913.

United States letters patent No. 1,075,557 issued October 14, 1913.

United States letters patent No. 1,078,042 issued November 11, 1913.

United States letters patent No. 1,098,361 issued May 26, 1914.

and of applications for letters patent now pending and undetermined. First party further owns, and Ford automobiles, parts and accessories are manufactured and sold under and embody the exclusive right to the use of

the name "FORD" acquired by and through United States copyright and trademark registration numbers 74,530, issued July 20th, 1909 (script word "FORD"), and 98,655, issued July 28th, 1914 (winged pyramid design), together with the rights acquired and established thereto by and through fair trade and trade user. The validity of each of said patents and of the said copyright, registration and trade user rights, and of the claims of the first party under said applications is hereby expressly admitted; and it is agreed that the sale and use of said automobiles as delivered to the second party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that second party's right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that no person shall acquire the right to use said automobiles or to own the same if there be any violation of the territorial or price restrictions set forth herein; and any such violation shall constitute an infringement of each and every of said patents, applications and inventions.

COMMISSIONS

(28) As second party's commission for making such sales of Ford automobiles, first party will, after payment by the purchaser, allow to second party (except in the cases specified in sub-division nine hereof)

fifteen per cent (15%) of such full advertised list price, and will allow to second party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

ADDITIONAL COMMISSIONS

(29) First party agrees to allow and pay to second party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement, upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than \$5,000.00, but when the second party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of \$5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: On all such business totaling less than \$10,000.00, one per cent (1%); if \$10,000.00 and less than \$20,000.00, two per cent (2%) on all such business; if \$20,000.00 and less than \$35,000.00, three per cent (3%) on all such business; if \$35,000.00 and less than \$50,000.00, four per cent (4%) on all such business; if \$50,000.00 or more, five per cent (5%) on all such business. That is, for illustration, if he shall have done \$7,000.00 total business as above described, his commission shall be one per cent (1%) on all of such \$7,000.00. If, for illustration, his total business as above described shall be \$34,900.00, his commission shall be three per cent (3%) on all of such \$34,900.00. If \$49,-

900.00, then four per cent (4%) upon all of such \$49,900.00; if it shall total \$50,000.00, then five per cent (5%) on all of such \$50,000.00, and likewise five per cent (5%) upon all such business over \$50,000.00.

If any payments shall have been made to second party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to, such payments shall be credited on the final amount owing him and shall be deducted when he becomes entitled to and shall receive the higher percentages.

PAYMENTS TO SUB-LIMITED AGENTS SECURED

(30) It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing or which may later become due or owing the Sub-Limited Agents under the second party have been fully paid, or until satisfactory arrangements are made with the first party to insure Sub-Limited Agents being paid the commissions and added commissions which may be due or become due to them under their respective contracts.

COMPANY MAY SELL DIRECT

(31) First party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of

the automobile or automobiles so sold, after it shall have received the full purchase price in cash, to the second party, or if there shall be a Sub-Limited Agent in that special territory and locality where such sale is made, then such five per cent (5%) shall be paid to such Sub-Limited Agent. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through Sub-Limited Agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Sec. 4 of this agreement. First party shall not pay any commission to second party or his Sub-Limited Agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory.

STOCK OF FORD PARTS

(32) Second party agrees that he will purchase from the first party on his own account and carry on hand at second party's place of business aforesaid, a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Thousand Dollars (\$2000.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as second party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford cars is often injured by the use therein of inferior

parts not made or furnished by the Ford Motor Company, therefore, the second party also hereby agrees that all his purchases of parts for Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

DISCOUNT ON PARTS

(33) First party agrees to allow the second party a discount of twenty-five per cent (25%) on all parts of Ford automobiles listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of second party's agreement to carry stock as provided in sub-division thirty-two above, and in consideration of the other provisions of this contract.

First party agrees to allow second party an additional discount of ten per cent (10%) on all Ford parts sold by second party at wholesale to Sub-Limited Agents under him; said additional ten per cent (10%) to be credited by first party monthly on receipt by it of certified itemized statement of such sales and deliveries made during the previous month by the second party.

RETURN OF PARTS

(34) The second party shall have the right and privilege of returning to first party at the place of purchase at any time during the term of this contract, or

within thirty days after its cancellation or expiration, but at his own expense, for credit at the purchase price, all such new parts of first party's automobiles as he may desire, except bodies, tops, tires, lamps, generators, speedometers, windshields, and other equipment known in the trade as "accessories" provided same are in as good condition as when sold by the first party to the second party.

COMPANY MAY SELL PARTS

(35) First party reserves the right and privilege to sell and deliver or cause to be sold and delivered any parts of Ford automobiles, repairs, accessories or other goods that may be ordered from it by any person or persons within the territory covered by this agreement, without the payment of any profit or allowance or any discount or credit whatever to the second party upon such sales. It is expected and intended that second party will carry the stock of Ford parts, repairs and accessories as herein provided, and that nearly all orders for such parts, repairs and accessories will be placed with him by all persons in the above described territory.

CLAIMS

(36) It is further agreed that no claims regarding errors in shipments or billings are to be recognized by first party, unless received in writing by it from the second party within ten days after receipt of the goods by the second party.

CRATING, ETC. EXTRA

(37) The first party will be entitled to receive an extra charge for crating, packing, double decking and loading, which the second party shall stand and pay as a part of the expenses of conducting his business.

DELAYS IN SHIPMENTS

(38) The first party shall not be liable in any way for delayed shipments of any goods ordered or on account of shipments by any other than a specified route.

PAYMENTS AT HOME OR BRANCH OFFICE

(39) The second party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by second party.

DEPOSITS

(40) As a guarantee of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of Eight Hundred Dollars (\$800.00) in cash, and it is agreed that the first party

may, at its option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

ESTIMATE OF AUTOS REQUIRED

(41) In order that first party may determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the second party agrees that he will require consignments of not less than 288 Ford automobiles for his said entire territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely:

For his wholesale and retail territory respectively, as follows:

In August, 1915, Wholesale Territory	22	Autos
In August, 1915, Retail Territory	8	Autos
In September, 1915, Wholesale Territory	16	Autos
In September, 1915, Retail Territory	24	Autos
In October, 1915, Wholesale Territory	2	Autos
In October, 1915, Retail Territory	24	Autos
In November, 1915, Wholesale Territory	0	Autos
In November, 1915, Retail Territory	8	Autos
In December, 1915, Wholesale Territory	0	Autos
In December, 1915, Retail Territory	8	Autos
In January, 1916, Wholesale Territory	18	Autos
In January, 1916, Retail Territory	16	Autos
In February, 1916, Wholesale Territory	0	Autos
In February, 1916, Retail Territory	8	Autos
In March, 1916, Wholesale Territory	2	Autos
In March, 1916, Retail Territory	38	Autos
In April, 1916, Wholesale Territory	24	Autos
In April, 1916, Retail Territory	24	Autos
In May, 1916, Wholesale Territory	8	Autos
In May, 1916, Retail Territory	16	Autos
In June, 1916, Retail Territory	6	Autos
In June, 1916, Wholesale Territory	8	Autos
In July, 1916, Wholesale Territory	8	Autos
In July, 1916, Retail Territory	0	Autos

REQUISITIONS MAY BE DECLINED

(42) First party agrees that the foregoing requisitions of the second party will receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right

to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever in the manufacture and delivery of its product—no legal liability to fill such requisition being incurred under any circumstances. And the second party may cancel, upon one month's full written notice to first party, the said requisitions, or what remains unfilled thereof.

PRICE MAY BE CHANGED

(43) It is further agreed that the foregoing requisitions for consignments of Ford automobiles are given by second party and received by first party subject to the express condition that prices are subject to be changed by the first party at any time during the year and deposits are so accepted; in the event of changes, however, the second party may cancel such remaining requisitions, and may demand and receive back from the first party such deposits as may have previously been made, less any amounts for which second party may be obligated or owing either directly or indirectly to the first party.

SUB-AGENCIES

(44) Second party shall appoint a Sub-Limited Agent or establish a properly equipped branch or garage for the sale and repair of Ford automobiles in every such city or town within the above described territory as shall at any time or from time to time be designated by

first party, in order that first party shall have adequate representation therein, and so that the public shall have at hand facilities for purchasing Ford automobiles, parts, repairs, accessories and supplies, and if second party fails to secure such Sub-Limited Agents, or establish branches as herein provided, then first party may do so, or first party may take such territory entirely away from second party, or first party may sell direct its automobiles, parts, accessories, etc., in such unoccupied territory, in any of which cases the second party shall not claim or be entitled to any commissions on business so handled.

SUB-LIMITED AGENTS' COMMISSIONS SUB-LIMITED AGENTS' CONTRACTS

(45) The second party shall allow and pay the Sub-Limited Agents the regular Limited Agent's commissions on the net volume of business done, and will require each Sub-Limited Agent to execute the Sub-Limited Agent's agreement provided in blank by first party in triplicate, and shall within three days after the execution thereof transmit in triplicate said agreement, properly executed, to first party for its approval and signature, and upon being executed by the first party, one copy each shall be delivered and kept by the first party and second party hereto and said Sub-Limited Agent. No arrangement or agreement made by second party with any Sub-Limited Agents shall be in any manner binding upon the first party until it shall have been reduced in writing on such blank aforesaid and ap-

proved and signed in triplicate by first party's duly authorized executive officer and delivered as aforesaid, and second party further agrees not to enter into any private arrangement or agreement with any party or parties to act as his Sub-Limited Agent except as herein provided. All Ford automobiles sold by first party through the Sub-Limited Agents of the second party, appointed and authorized as aforesaid, shall be considered as taken by the second party as a portion of the Ford automobiles handled by him under this contract.

DEPOSITS OF SUB-LIMITED AGENTS

(46) The first party shall be custodian of all contract deposits made by the Sub-Limited Agents and of all deposits made by proposed buyers, and in the event of the termination or cancellation of this contract, second party shall have no claim whatsoever directly or indirectly against first party, for such deposit moneys, whether such deposits are made through the second party or directly by the Sub-Limited Agents or buyers themselves. When deposit moneys are transmitted to the first party by the second party, second party shall specify whose money the same is, and on what particular contract or Retail Buyer's Order such deposit is being made.

NO ASSIGNMENT

(47) The second party shall have no right to assign this contract, or any interest in the same, without the written consent of the first party.

CANCELLATION

(48) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annual this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

SALE OF AUTOS ON HAND AT TIME OF
TERMINATION

(49) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided however, if, after reasonable effort on the part of second party to make such sale there shall remain on

hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

PERFORMANCE OF SUB-LIMITED AGENCY CONTRACTS

(50) In case of cancellation of this contract first party will carry out all such contracts made with Sub-Limited Agents under the second party, as were made with the approval of the first party as herein provided, the intent being that the first party shall take the same off the hands of second party.

TERMINATION

(51) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract

NO WAIVER OF THESE PROVISIONS

(52) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the second party of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

MICHIGAN CONTRACT

(53) This contract, it is agreed, is a Michigan contract and shall be construed as such.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Signature of the First Party

FORD MOTOR COMPANY,

By *W. A. Ryan-A.* (L. s.)

Manager of Sales.

Approved *F. B. Norman,*

Branch Manager.

O. K.'d *J. S. Beckhardt,*

Accounting.

Ckd. and App. *E. W.,*

Sales.

Signature of the Second part

Eugene Ford Auto Co. (L. s.)

By *F. M. Hathaway (L. s.)*

Witness *Chas. E. Godon,*

First National Bank.

(Name of Limited Agents Bank)

Trial balance, July 31, 1915.

C. R., Aug. 13, 1915, page 15.

C. R., Sep. 9, page 40.

Mr. McDougal: I also desire to offer in evidence letter dated May 25, 1916, signed Ford Motor Company, F. B. Norman, Manager, admitted to have been received by the Eugene Ford Auto Company, at Eugene, Oregon, though registered mail.

Marked PLAINTIFF'S EXHIBIT 2.

"Portland, May 25th, 1916.

Eugene Ford Auto Company,

Eugene, Oregon.

Gentlemen:

In accordance with the provisions of Sub-divisions 46 and 47 of your contract, notice is hereby given of the cancellation of your Limited Agency Contract with the Ford Motor Company effective as of this date.

In this connection, attention is called to Sub-division 47 of the contract relating to the winding up of the

affairs of the Limited Agency in the event of the cancellation of the contract.

Ford Motor Company,
F. B. Norman, Manager."

CROSS EXAMINATION

(Questions by Mr. Hardy)

Q. Did you not send a telegram previous to sending the letter?

A. Yes, sir.

Q. A telegram stating—

Mr. McDougal: If the court please, I object. The telegram is the best evidence.

Q. Have you the original of that telegram?

A. I have not.

Q. Did you keep an office copy?

A. Yes, I imagine so.

Q. Can you produce it?

A. I don't know. I think so.

Q. I would like to have you produce it, if you please.

A. Yes.

Mr. McDougal: We will produce it if we can find it.

Witness excused.

Charles E. Goden, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. Were you down to Eugene to interview Messrs. Winchell and Hathaway, subsequent to May 25th, the date upon which this registered letter was mailed to Winchell and Hathaway, cancelling their contract?

A. About that date, yes, sir.

Q. For what purpose did you go down there?

A. Instructions from the Ford Motor Company, my manager Mr. Norman, to go there and displace them as agents, and place Vick Brothers in that territory.

Q. What did you do when you first went down there?

A. Well, I got in there—went to Hathaway and Winchell's office or place of business, the Eugene Ford Auto Company, and told them that I had been sent there for that purpose, cancelling the contract, and they received the registered letter at the time I was in their office. I said "That is your notification of cancellation, which is according to the rules of the contract." They said "Yes, we understand that; we expected it."

Mr. Goden further testified as follows:

And I called their attention to the clause in the contract which provided for this cancellation, and also the proviso of taking the cars back, and they said "Where is that clause," Mr. Winchell said. I told him and showed it to him, and he took a copy of the contract and invited me to go to the attorney's office, and I said, "No, I will not go to your attorney's office. I have nothing to do with attorneys. When I go to your at-

torney's office, my attorney will be with me," and he went off with the contract.

Q. Could you find the clause of the contract that you read to them?

A. If I remember, it is 43.

Q. Just take exhibit 1, and see if you can find the clause in the contract.

A. I think it is in 22 here—yes, it is in paragraph 49 of this contract "Sale of Autos on hand at Time of Termination." That is the clause.

Q. All right. Just read that to the jury.

A. "49. In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said

second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make." That went along to the fact—I took this clause along to show that they didn't have them sold until the ten per cent provided—

Mr. Goden further testified:

DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. Will you state whether or not at any time subsequent to May 26th you ever made any tender of the advancements on these machines by Winchell and Hathaway.

A. Before May 26th?

Q. Subsequent to May 26th.

A. Oh! yes, the company forwarded to the bank in Eugene telegram to honor my draft in payment of the \$16,077, I believe, and some odd cents—I forget just exactly the figures—in payment of a check payable to Hathaway and Winchell for automobiles, and the bank was to notify me that the check was there—the money was there at my disposal but only for that purpose—could only sign a check for return to them—for Hathaway and Winchell. The telegram specified that was the only use I could make of this money.

Q. You say you had this \$16,077.50 in the bank there at Eugene?

A. A telegram authorized the draft and the bank notified—I saw the banker and he said it was there, and that I could sign it for that purpose.

Q. Will you state whether or not you made any effort to get this money and give it to Winchell and Hathaway?

A. Yes, I attempted to get Winchell and Hathaway, if I remember right, on the day I had the money in the bank to use, but I believe one was in Portland, or some delay, I couldn't see them until evening. I at first demurred and thought I would take it up the next morning; they said, "Well, we will meet you." I said, "All right, you can come to the hotel then." And they closed their place of business at six o'clock and I was at the hotel. I said, "Come on up to my room, and we will talk the matter over," and Mr. Vick—yes, I believe Mr. Vick was with me. So when he got to the hotel, Mr. Hardy was with him, their attorney. They said, "This is Mr. Hardy" in the lobby, and we all walked up to the room, and I said, "Now, I have the money in the bank to pay you for those automobiles you have in your possession," and Mr. Winchell said, "You mean cash," and I said, "Yes, I have got the cash." He says, "I won't do anything without I get cash from the Ford Motor Company." I said, "all right, the cash is in the bank. I can't get it tonight but will get it in the morning." He says, "You mean you can get it in the morning? It is there?" I said, "Yes, it is there." I said, "Are you willing to accept that?" And their attorney spoke up in the conversation, and I said, "I don't recognize you. I am not talking to their attorney. I asked to talk to Mr. Winchell and Hathaway, and I don't recognize you at all in this." He says, "I am their attorney." I says, "That don't make any difference, and I didn't ask you

to the room." With that he started to walk out, and he says, "We will take it under advisement." And I said, "No advisement in this case."

Q. Was there anything said there at that time by Mr. Hardy or any one else with reference to whether or not they understood this to be a tender?

A. Yes, I took it up with that action, that I was tendering them the money.

MR. SMITH: We move to strike out that answer, and ask to have him answer the question.

COURT: State what was said about it.

Q. (Read as follows: Was there anything said there at that time by Mr. Hardy or anyone else with reference to whether or not they understood this to be a tender?) Just answer that question.

Q. By any one else?

Q. (Read.)

A. Yes.

Q. Who said that? Who made the statement?

A. I made the statement to Vick Brothers at the time that we were going to tender them this money. We went up there. I told them to come up as a witness I was tendering this money.

Q. Well, was anything said by Mr. Hardy—

MR. SMITH: I move to strike that out; that is not responsive to the question—what he said to Vick Brothers, outside the presence of these defendants has nothing to do with this case.

COURT: State what you said to the defendants.

A. I said, "I am here for the purpose of making a tender to you of this money for these automobiles,

according to the contract." And then he spoke up and said, "Well, we will take that under advisement."

Q. Did you the next day make any attempt in any way to tender this money again?

A. Not excepting meeting, I believe it was Mr. Winchell on the street, and telling him the money was ready for them if they wanted it.

Q. Was anything said by you, or any invitation extended to them to come to the bank?

A. I told them that their banker had received a telegram to that effect, that it was there. It was their same banker, you see, that got the notice.

Q. Mr. Goden, did you make a demand upon the defendants here for the possession of these cars?

A. No, I didn't make the demand.

Q. You at no time made any demand for the possession of the cars?

A. Not I.

CROSS-EXAMINATION

(Questions by Mr. Hardy)

Q. Now, did you offer Winchell and Hathaway that Friday night, in the hotel, cash?

A. Told them it was in the bank. I couldn't get in the bank then.

Q. Did you offer them a check for the money?

A. Told them I had the right to draw check, yes.

Q. You simply told them that the money was there and you could give a check the next morning, and I told you we would take it under advisement, didn't I, and you said the offer was withdrawn, didn't you?

A. I told you at the time, speaking to you at the time, as far as you were concerned, the offer was withdrawn. I was talking to Hardy.

Q. You knew I was representing Hathaway and Winchell?

A. Not the way you came. You didn't say so until you got to the room.

Q. They told you I was their attorney?

A. Not until we got in the room.

Q. And we three came into the room?

A. The fact is, I didn't know you were following me up, going into the room.

Q. You didn't put me out of the room?

A. No, I didn't.

Q. And you told us then and there the money was in the bank and you could give us a check the next morning?

A. Yes.

Q. That is as far as you went in making a tender, when you said that?

A. I said this—I want to correct you. I said, "According to the contract the money was in the bank to pay them for the amount of money they had invested in these cars."

Q. When I told you we would take the matter under advisement, didn't you then and there say the offer is withdrawn?

A. I said, "No advisement in this case as far as you are concerned." The offer was withdrawn. That was you.

RE-DIRECT EXAMINATION

(Questions by Mr. McDougal)

Q. And you at no time, prior to the Monday that the marshal took these automobiles, asked them for the automobiles in question?

A. No, I do—No.

Q. Made no demand upon them?

A. No.

Mr. Norman further testified as follows:

CROSS-EXAMINATION

(Questions by Mr. McDougal)

MR. McDOUGAL: Here is the telegram you asked for.

Q. Is this the telegram that you sent to Winchell and Hathaway before you sent the registered letter?

A. Yes, sir.

MR. HARDY: We offer it in evidence, if your Honor please.

MR. McDOUGAL: For what purpose is that offered in evidence? To show cancellation of the contract?

MR. HARDY: The purpose it is offered in evidence for is it tends to show your course of conduct towards us. Tends to show malice, too.

Marked DEFENDANTS' EXHIBIT E and read as follows:

“Portland, Oregon, May 24, 1916.

Eugene Ford Auto Co.,

Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Vick Brothers who will open a branch at Eugene.

FORD MOTOR COMPANY."

Witness excused.

V. W. Winchell, a witness called on behalf of the defendants, testified as follows:

Q. Mr. Winchell, you received a telegram, did you, of which copy was offered in evidence?

A. Yes, sir.

Q. And the registered letter?

A. Yes, sir.

F. M. Hathaway, a witness called on behalf of the defendants, testified as follows:

Q. Were you in Eugene at the time this telegram was received that was in evidence?

A. Yes, sir

Mr. Hathaway further testified as follows:

Q. Who went to the hotel?

A. Well, Mr. Winchell and I, our attorney, Mr. Hardy, went to the hotel that evening, and met Mr. Goden and Mr. Vick in the lobby and we introduced each other all the way around, and Mr. Goden suggested that we go up to his room, so we did so, and Mr. Winchell asked Mr. Goden if he was ready to pay over the cash—the money; well, Mr. Goden said that he couldn't do that; that after interviewing the managers at Portland, why, they had objected, but they had agreed to pay over the 85 per cent list price of the cars in question on the cars what we had in stock at that time.

Q. What about the contract money and bonus money? Your own money that was deposited and your bonus money?

A. Well, he said that could be taken care of afterwards. He says, "I can't say you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that we were entitled to our bonus money and also to our deposit, and he said, well he says, "I am only authorized to pay you the 85 per cent," and he says, "I have the authority, or have the money at the First National bank, and can make you a check tomorrow morning."

And it is hereby certified that the foregoing is all of the evidence that was introduced by plaintiff at the trial of this cause relative to any tender by plaintiff to the defendants Winchell and Hathaway of their payments to the plaintiff for the automobiles described in the complaint. And the only evidence offered by plaintiff at the trial of said cause relative to any demand being made upon the defendants Winchell and Hathaway for the automobiles in question prior to the commencement of this action.

Mr. Hathaway further testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Do you recall then what I said?

A. Well, Mr. Hardy mentioned that we would

take this under advisement, and immediately Mr. Goden mentioned that the deal was off; well, Mr. Hardy says, "then it is time for us to go. We will just simply take this under advisement." And we got out, half way to the door, and Mr. Goden repeated that.

Q. Repeated what?

A. That the deal was all off; and when we got out to the elevator and was stepping in and he followed out there, and Mr. Vick and Mr. Goden said that the deal was all off.

Upon the trial of this case counsel for the plaintiff contended that the contract, being plaintiff's exhibit 1 was a consignment contract leaving the title to the automobiles in controversy in the plaintiff until they had been finally sold by the defendants.

Counsel for the defendants contended that the contract under which the automobiles in controversy were sold was not a consignment contract and that title to the automobiles in question passed to the defendants upon the payment of the eighty-five (85 per cent) of the purchase price therefor, provided for in said contract.

After the close of all the evidence the court instructed the jury, amongst other things, as follows:

"Now, the contract as entered into between the plaintiff, The Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company, exercising the right given by this

contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85 per cent of the list price, or all that they were expected or required to pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants that amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had."

To the action of the court in instructing the jury that the plaintiff did not make a sufficient payment or

tender to the defendants, and was, therefore, not entitled to the possession of the cars in controversy, the plaintiff duly excepted, which exception was allowed.

Upon the trial of the above entitled cause the plaintiff requested the court to instruct the jury as follows:

IV.

I instruct you that payment to the defendants of advancements on the said automobiles by defendants before taking possession of the same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment.

To the action of the court in refusing to give the above instruction, being plaintiff's requested instruction IV, the plaintiff duly excepted, which exception was allowed.

V. W. Winchell, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Now, as I understand it, the price at which you could sell these cars was \$493.25?

A. \$493.25.

Q. For each of the touring cars?

A. Yes, sir.

Q. At what price could you sell these cars?

A. \$493.25.

Q. And you were carrying on your business in the usual course were you?

A. Yes, sir.

Q. At the time the cars were taken?

A. Yes, sir.

Q. And you had prospects?

A. Yes, sir.

Q. Selling cars right along?

A. Yes, sir.

Q. State to the jury what the fact is as to whether or not in the ordinary course of your business, from the time these cars were taken up to the first of August you could have sold these thirty-six touring cars at that price to the public.

A. Well, the best way that I can state that to the jury would be that at the time we were interfered with by the Ford Motor Car Company, it took away from us the two best months of the year, two best selling months, the height of the automobile selling season, June and July. Our contract ran from August to August. Another thing to substantiate that fact is the amount of business that Vick Brothers did at that same station from the time we were practically thrown out. They sold—

MR. McDOUGAL: If the court please, I object to any testimony as to what Vick Brothers did.

Q. State whether or not you could have sold the cars in the ordinary course of business at that time.

A. We certainly could, yes, sir.

Q. As I understand it, the selling price of the Sedan was \$983.25. Is that right?

A. I think so.

Q. That is, I mean you would sell it to the public.

A. Yes, sir.

Q. Now, if including these cars you purchased 179 cars, as a mathematical proposition you had sold during the year 179 less 37. Is that right?

A. Yes.

Q. Or 142 cars that you had sold during the year?

A. That is in our territory.

Q. Now, who fixed the selling price of these cars?

A. The Ford Motor Company.

Q. The plaintiff in this case?

A. Yes, sir.

Q. And they may dictate to you the price at which you should sell the cars?

A. Yes, sir.

Q. And they fix the value then, at Eugene, of \$493.25, for a touring car?

A. Yes, sir.

Q. And \$983.25, for a Sedan?

A. Yes, sir.

Q. And you were supposed to be content with that profit?

A. Yes, sir.

Q. Now, since the company took the cars, have you been out of business?

A. Yes, sir.

Q. Just been waiting there at Eugene until this matter was disposed of?

A. Yes, sir.

Q. Were you able to engage in any other business during this interim?

A. Lack of funds. Our money is tied up.

Q. You have never received a dollar from the Ford Motor Company, have you?

A. No, sir.

Q. They have never put the money in front of you where you could get it?

A. No, sir.

Q. If you wanted it. Now, what kind of business—tell the jury what kind of business you were doing there. What was your average profit, outside of the price of the cars, running the garage and selling parts and gasoline and oil?

A. Well, the profit varies, but I should think—

Q. What would it average?

A. (Continuing) that a fair average of our profit would be a third—30 per cent on the garage business. The cars are 15 per cent but we were enjoying a very nice business. Naturally our being the Ford agents there we corral practically the most of the Ford business.

Q. What did it amount to a month, on the garage business?

A. Oh, I haven't—

Q. Just approximately.

A. Approximately \$300.00.

Q. \$300.00 a month?

A. Yes, sir.

Q. That was selling what?

A. That is the parts and accessories, gas and oil, and stuff of that kind.

Q. That wasn't involved in the Ford contract at all?

A. No, sir.

Q. And how many automobiles were you able to take from the first of August, 1915, to the first of August, 1916?

A. 286.

Q. And you would have had your profit on each of those cars?

A. Yes, sir.

Q. That would be 15 per cent on every car?

A. Yes, sir.

Q. How many did you sell from the first of August, 1914, to the first of August, 1915? Would 161 be about right?

A. I think that was the amount, yes, sir. Mr. Hathaway took that off the books.

Q. I have a memorandum here from the first of August, 1913, to the first of August, 1914, 88 cars.

A. Yes, sir.

Q. What is the fact as to whether or not the business was increasing in that proportion. About doubling each year?

A. Yes, sir.

Q. Now, one of the witnesses has testified that after this case was commenced and after the cars were taken, somebody has gone into the First National bank of Eugene and paid some debt of yours there. Did you ever authorize anyone to do that?

A. No, sir. I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed?

A. Yes, sir.

Q. In this case, now, have you ever received the five per cent additional bonus on the 179 cars?

A. No, sir.

Q. I believe you testified that Mr. Goden agreed that they would give you that?

A. Yes, sir.

Q. So that as a total you would be entitled to 20 per cent on 179 cars, 15 per cent plus 5 per cent bonus?

A. Yes, sir.

Q. And you have never received the \$800.00 of your money that the company has?

A. No, sir.

Q. Tell the jury what kind of a building you had in Eugene, where it was located, and the size of it.

A. Our building was—our floor space was, I think, 50 feet wide by about—oh, I don't know the depth—95 or 100 feet deep, three blocks from the main street there; it was a concrete building.

Q. Now, I wish you would tell the jury whether or not your business was decreasing or increasing.

A. Our business had been on the increase ever since we had taken hold of it.

Q. And all your capital is invested in these cars, and you haven't received it. Is that correct?

A. Yes, sir.

Q. Now, when the Ford Motor Car Company took possession of these cars under the writ of replevin, that

was after you had agreed to, or had a tentative agreement to sell out the other business to Vick Brothers?

A. Yes, sir.

Q. When the Ford Motor Car Company took all these cars that you had bought and paid for, who since then has had possession of the gasoline and garage business?

A. Vick Brothers of Salem.

Q. The whole business has been taken away from you.

A. Yes, sir.

Q. And you have been turned out of the building itself, have you?

A. Yes, sir.

Q. Now, in your answer you claim the value of these cars, these thirty-six touring cars to be at \$493.25?

A. Yes, sir.

Q. And the Sedan at \$983.25?

A. Yes, sir.

Q. And none of that money you have received at all?

A. No, sir.

Q. And in addition to that there is your \$800.00?

A. Bonus money.

Q. No, deposit money.

A. Contract deposit money.

Q. And the 5 per cent bonus on the amount of thirty-six touring cars at \$493.25, and the Sedan at \$983.25?

A. Yes, less a partial payment probably six months ago, sometime ago, on this bonus money.

Q. That is six months ago you received some bonus money?

A. Yes, sir.

Q. And when you and Mr. Goden figured up the bonus money that he said he would get you, what did you figure it up at, at that time?

A. I can't give the exact amount.

Q. You can get that, can you. You have a memorandum?

A. Yes, we have a memorandum.

Q. All right, I won't ask at the present time. And in addition to that is your \$800.00?

A. Yes, sir.

Q. Besides the money you paid for the cars?

A. Yes, sir.

Mr. Winchell further testified as follows:

CROSS-EXAMINATION

(Questions by Mr. McDougal)

Mr. Winchell, what was the consideration for the sale of this garage?

A. You mean by that, the amount?

Q. Yes, what did you get for it?

A. Why, it was—I will have to refer to our records. It was in the neighborhood of two thousand for the part Vick Brothers were to take—wasn't it—eighteen hundred and something, if I remember correctly.

Q. Well, but if I understand it, Mr. Winchell, didn't Vick Brothers—you took an inventory of the stock, didn't you?

A. Yes, of the stock we had on hand at that time.

Q. Stuff you had on hand?

A. Outside of the cars.

Q. Then you turned it over to Vick Brothers dollar for dollar, for what it cost you?

A. Yes, sir.

Q. That is all you did get?

A. Yes, sir.

Q. And you want the jury to understand you were selling out a business that was paying you fellows net \$300.00 a month, dollar for dollar?

A. We got nothing for our business; we merely sold the stock and fixtures, merchandise we had on hand, accessories and stuff of that kind.

Q. What were you going to do with your business? You say you got nothing for the business?

A. I don't quite understand.

Q. You say you got nothing for the business. Did you give them the business in addition to the stock that they took over?

A. Yes, with a view of going into something else.

Q. You just threw that in with the stock?

A. Yes, sir.

RE-DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Did they tell you that the reason they had cancelled the contract was because you had sold one or two cars for less than \$493.25?

A. No, sir.

Q. Did they intimate that was the reason they were taking the cars away from you?

A. No, sir.

Q. Mr. Winchell, it has been intimated or suggested that you sold the garage business to Vick Brothers. Was that deal completed when these cars were taken—with Vick Brothers. Did you ever get your money from Vick Brothers? Did they ever pay you up?

A. No, sir.

Q. What is the fact as to whether that was made part of the sale to the Ford Motor Company?

A. I understood it as such.

Q. That is on the Goden deal?

A. Yes.

Q. That they backed out of afterwards?

A. Yes, sir.

Q. And you have a case pending in Lane County that Vick Brothers brought?

A. Yes, sir.

Q. And that is not disposed of or settled?

A. No, sir.

Q. You were asked if you didn't have the agency for the Dodge cars. What is the fact as to whether or not the Ford Motor Car Company forced you to give up the Dodge agency?

A. That was the reason we gave up the Dodge line, because the Ford Motor Car Company compelled us to do so.

Q. And after that you still went ahead on the Ford?

A. Yes, sir.

Q. For how long, before they took the cars away?

A. Pretty near a year, I guess.

F. M. Hathaway, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Hardy)

Q. Now, you describe to the jury the kind of business you were doing there, whether it was an increasing or decreasing business, the character of the business.

A. Our business was on the increase from year to year, and increased according to the number of cars that we were selling; what I mean by that is that each and every car we sold, we sold more or less accessories on, and done more or less work for. As they would become old, why, we had to do various work for them—various kinds.

Q. What do you estimate that general business, outside of the sales of the cars, as to your profit?

A. We always figured that our business was paying—well we thought conservatively three hundred a month—our garage end of the business.

Q. Then there was the profit on the cars besides?

A. Yes, sir.

Q. And you made 15% on the cars besides the bonus?

A. Yes.

Q. Now, you have been there doing business three years. What is the fact as to whether you had got pretty well acquainted in Lane County?

A. Well, Eugene is not a very large city, and we had opportunity of becoming very well acquainted, because we had an established business there, and were known all throughout the county mostly, with the exception of over on the coast.

Q. What would you say as to whether or not you had the good will of the people up there—I know you are modest about it?

A. I would rather somebody else would say that. Why, I think we stood pretty well in the community.

Q. Please tell the jury what other offers you have had this summer to go into business.

Mr. McDougal: I object, as incompetent, irrelevant and immaterial; that is objected to; it certainly would not tend to show damages in this case.

Mr. Hardy: It would show we are tied up so we couldn't go into business. We could have gone in if we had had the money.

COURT: Ask if they did go into business, and if not, why not.

Q. Did you have any other opportunities to go into business this summer?

A. Well, Mr. Winchell and I—at this time when my mother drove over into Eastern Oregon, and when we arrived at Pendleton, Mr. Simpson, of the Ford Motor Company there, their representative, told us there was a man there waiting us at the hotel, for a couple of days—

Q. Just tell what the offers were. Don't go into all the details.

A. He wanted to offer us the Studebaker line. Then when we got over to Walla Walla we had an opportunity to take on the Buick line there, but on account of lack of funds, our funds being tied up, we were not able to do anything.

Q. Your money being tied up in these Ford cars?

A. Yes, sir.

Mr. McDougal: Will the Court allow an exception to my objection?

COURT: Yes.

Q. So you have not been able to go into any business on account of your capital being tied up in this manner?

A. Until we get our money.

Q. Tell the jury the number of cars and the amounts that were to be paid for the cars.

A. There were 36 touring cars and one Sedan, and we were to have paid 85 per cent of the list price at Detroit.

Q. Well, you have it on your card there the amount you had paid for each of these cars?

A. We paid in the neighborhood of \$374 for the touring cars, \$331.50 for the runabout and \$786.25 for the Sedan. Then there was the additional \$53.25 that we paid freight from Detroit to Eugene. Also an additional \$5.00 extra on the Sedan; it costs a little more.

Q. State to the jury whether or not there was any further amount to be paid by you.

A. No, sir.

Q. Then when you sold the cars you got your profit?

A. Yes, sir.

Q. And if you didn't sell them, you didn't get the profit—is that right?

A. They remained ours.

REDIRECT EXAMINATION.

(Questions by Mr. Hardy.)

Q. Did you want to sell your business to Vick Brothers, your gasoline business?

A. We had no desire to sell it.

Q. What is the fact as to whether or not that is a part of the transaction which Goden said you had to make to get out?

A. We considered that they were joined together—negotiating the deal together.

Q. Did they come there together?

A. They came there together and we were notified by telegram, as was read here before, that Vick Brothers would take over our business; that is the first we knew anything about it.

Q. That is, the Ford Company selected the person that you had to sell to; is that right?

A. Yes, sir.

Q. And you felt after what was said to you that you had to go through with the deal as he outlined it?

A. Yes, sir.

Q. If it hadn't been for the action of the Ford Motor Car Company would you have dealt with Vick Brothers? Would you have had any notion of selling this business?

A. No, we had no notion of selling out; we were going along.

COURT: Was your transaction with Vick Brothers prior to the time the cars were replevined?

A. Yes, it was, the time that we negotiated—that is, began to talk to Mr. Goden; he seemed so positive that the deal would go through just as he stated, that we immediately began afterwards to invoice, before he came back from Portland.

COURT: When was it that Vick Brothers paid you the thousand dollars?

A. That was after the invoice.

COURT: Before or after the time that the United States Marshal took possession?

A. That was before the time.

COURT: Before the Marshal took it?

Mr. Hardy: Set out in these pleadings, your Honor, the date, the 29th of May; on the 26th they got the letter cancelling.

COURT: Now, Mr. Hathaway, I understood from your testimony that you claim that the action of the Ford Motor Company in cancelling their contract and replevining these cars destroyed your garage business.

A. Yes, sir.

COURT: And that by reason of the fact that you had to close that up or sell it out. Is that the idea?

A. It seems as though Vick Brothers put up a deposit there with the court and took over the business, you see.

COURT: You are claiming here, as I understand

it, that you were compelled to virtually close this business because the Ford Motor Car Company cancelled their contract and replevined these cars that you had previously ordered and paid for?

A. Yes, sir.

COURT: And that was the reason you had to close your garage. Now, do I understand from that that you would not have been able to have carried on this garage business if the Ford Motor Car Company had refused to furnish cars—sell you cars?

A. We could have carried on a general garage business because we were well known in the community, and, for instance, our mechanic who was working for us immediately went off to himself and started up a little place repairing cars, and is doing a nice business at the present time.

COURT: Then how do I understand that you base your claim that the replevining of these cars destroyed the garage business? You understand this contract only had two months to run, and in any event at the end of that time the company would have been under no obligations to sell you cars.

A. Well, you see, Vick Brothers had a deposit on our business and they had us tied up, you see, in a way.

COURT: On what part of your business?

A. On the garage end—accessories and parts.

COURT: That is because of their contract or agreement with you?

A. Yes, sir.

COURT: Your idea is then that the failure of the Motor Car Company, if I understand you correctly—

the failure of the Ford Motor Company to carry out the preliminary agreement that you had with Mr. Goden was really the cause of your trouble.

A. Yes, sir.

COURT: That is the idea?

A. Yes, sir.

Mr. Hardy: If I may explain, that is set up in this answer that is offered in evidence—a three-cornered deal.

COURT: What I couldn't get clear through my mind was how the mere taking of these cars by the Ford Company away from these people could destroy their garage business, when that contract only ran for two months.

Mr. Hardy: They forced us as a part of it—

COURT: I understand now. I haven't examined this contract, but I suppose it is like all these contracts, and there was no obligation on the part of the Ford Company to furnish these people any cars.

Mr. McDougal: The same contract we had up—

COURT: Optional with the company whether they furnished any cars at all, and optional with the dealer whether they would take them.

Mr. Smith: Not optional; the dealers they had to take them.

Mr. McDougal: The dealer could cancel.

COURT: Either company could cancel, and the dealer was not obligated to take any cars, nor the company obliged to furnish them. That is all. I just wanted to understand his theory. I couldn't get it.

The above was all the evidence introduced by the

defendants upon the trial of the above entitled cause to establish damages to their business by virtue of the alleged wrongful action of the plaintiff in seeking to recover possession of the automobiles in question.

Upon this branch of the case the court instructed the jury as follows:

“Now the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of these thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent, if you can arrive at that conclusion. They allege in their answer that their business was paying an income of \$300.00 a month and that they were deprived of that income by reason of the wrongful acts of the plaintiff company.

Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants, of course, deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is, if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold

the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages.

Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture, but upon the facts and circumstances of the case as disclosed by the testimony."

To the action of the court in giving the above instruction to the jury, the plaintiff duly excepted, which exception was allowed.

Plaintiff requested the following instruction upon the question of damages:

XI.

The burden is upon the defendants to prove by a preponderance of the evidence that the automobiles here in question are of the value they allege, namely, \$18,555.25, and that they have been further specially damaged in the sum of \$25,000.00, and unless defendants do convince you by a preponderance of the evidence to this effect, then they have failed and your verdict should be against them."

To the refusal of the court to give said instruction to the jury the plaintiff excepted, which exception was allowed.

The plaintiff also requested the court to give the following instruction:

B.

"I instruct you that the defendants have failed to prove damages in this case and that the only question for you to decide is who are the owners and entitled to the possession of the automobiles in question and their value."

To the action of the court in refusing to give plaintiff's requested instruction B, plaintiff duly excepted, which exception was allowed.

F. B. Norman, a witness called on behalf of the plaintiff, testified as follows:

Q. What became of this \$12,676.38 that was sent down to Eugene for the purpose of returning to the defendants in this case?

A. That was paid to the bank on mortgages they had given for these cars.

Mr. Smith: We move to strike that out if the court please. There was no payment before this action was begun at all and no payment to us, or for us, or with our authority, to anybody.

COURT: They will have to show that was done with the authority of the defendants, or paid to them before the action was commenced, as I understand it.

Q. For what purpose did you say this was paid to the bank, this money?

A. Money that they had advanced on these cars for the Eugene Ford Auto Company.

Q. Do you know whether or not it was impossible for the Ford Motor Car Company to get possession of these cars, as far as the bank was concerned, until this money had been paid to the bank?

Mr. Smith: Objected to; that calls for a conclusion of the witness. Let him state the facts if they will justify such a position, and the man knows.

COURT: I think the objection is well taken, and I don't see that it has anything to do with the merits of this particular case on trial now.

Mr. Smith: They took the cars under the writ. It is admitted here that the Deputy Marshal was down there and took the cars immediately after Mr. McDougal's brother made the alleged demand on that Monday morning.

F. B. Norman, the said witness, on behalf of the plaintiff, further testified as follows upon cross-examination:

Q. At what date do you claim you gave the First National Bank at Eugene the twelve thousand dollars?

A. Sixteen thousand, I think it was, the value of the cars. I don't remember the dates now. It was at the time, though, after the cancellation went into effect.

Q. You don't know the date?

A. I haven't it here, no.

Q. You don't know how much you gave the First National Bank either, do you?

A. Well, I don't remember the figures.

Q. It was after this action was begun? You know that, don't you?

A. Not that I know of, no.

Q. Don't you know, as a matter of fact, that it was not only after that action was begun, but after the answer was filed?

A. No, sir.

Q. You don't know that that statement is not true, though, do you?

A. There was no action begun at the time I authorized this money from the Lumbermens Bank to be sent to Eugene.

Q. No, I mean at the time you paid it to the bank. You say you paid some money to the First National Bank at Eugene. Don't you know as a matter of fact, you didn't do that until after this action was commenced and after the answer was filed?

A. That is probably so, I wouldn't say.

V. W. Winchell, a witness called on behalf of the defendants, testified as follows:

Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of Eugene and paid some debts of yours there. Did you ever authorize any one to do that?

A. No, sir. I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed?

A. Yes, sir.

Thereupon the defendants made the following motion:

Mr. Smith: There are two or three motions in relation to the record we want to make to keep the record straight on the evidence. We first move to strike from the consideration of the jury all evidence offered on be-

half of the plaintiff as to the payment to the First National Bank of the twelve thousand dollars on the ground that it was not authorized by the defendants or made through any privity of relationship requiring plaintiff to make such payment. Upon the further ground it was a voluntary payment if made at all and cannot be charged to the defendants under any circumstances.

And thereupon the court made the following ruling:

COURT: I think that is well taken as far as constitutes any defense in this case.

To the action of the court in taking from the consideration of the jury the claim of the plaintiff for the amount of money paid by the plaintiff to the First National Bank of Eugene, Oregon, the amount of the lien imposed upon the automobiles in controversy by the defendants, the plaintiff duly excepted, which exception was duly allowed.

After the close of all the evidence introduced upon the trial of the above entitled cause the defendants made the following motion for a directed verdict:

Mr. Smith: The defendants move that the jury be instructed that the plaintiff has no cause to submit to them, under the plaintiff's own evidence, first because the contract involved is in violation of the Sherman Anti-trust Act and the Clayton Act, and being violative, the title to the cars absolutely passed when the drafts were paid, and that the plaintiff itself has shown that the plaintiff has no title to the cars whatsoever, but they were fully paid for by these drafts, and the title is in the defendants, and at the time this

case was instituted the defendants owned the cars absolutely. Second, that the plaintiff has proved no demand before entering this action, and even if the contract were not in conflict with the Anti-trust Acts of the United States, it provided they would have a lien on these cars for the amount of money they advanced, and they never extinguished or offered to extinguish that, but began suit without any demand or tender.

COURT: Isn't there a provision in the contract by which the plaintiff company could recover possession of these cars upon payment of advances?

Mr. Smith: They haven't paid them. There is a provision to this effect: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation for all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for

the purpose of winding up the affairs of his said limited agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration, the same to be made strictly under and in accordance with the terms of this contract, provided however, if after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make."

My point is they were all sold and were not consigned. That consignment we say depends upon the prior contract which we say is violative of the anti-trust laws. We take it that the transaction was an absolute sale and not consignment. They attempt to treat these cars as having been consigned but they didn't tender the amount we had paid into them, and right there is a strict provision that if they proceed on that theory they must at the same time "return to him his advancements on the said automobiles" which they never did. So either way we have it—if the contract violates the anti-trust laws of the United States, the cars are ours; if it does not violate them, they didn't tender or offer to return the advancements, and in either case they are out of court, and, as counsel has suggested, if their contract is valid we were lawfully in possession of these machines, even if they owned them—we had acquired

them lawfully and had a lien for 85% on advances, and they didn't extinguish that lien and didn't make a demand, and the rule is absolute when a person can replevin personal property, even though it belongs to another, demand must be made for the return or the action for replevin will not lie.

COURT: As I interpret this contract, for the purpose of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale. In any event the contract provided that the Ford Motor Company might recover possession of them in case the contract was cancelled upon returning the advances, but before it could recover, it must return the advances or at least tender them, and the evidence in this case shows it did neither—it did not return the advances nor did it tender the money. All the evidence is Mr. Goden said he had the money in the bank but never offered to pay it—never gave the defendants any opportunity to accept it, but proceeded to institute this action without complying with their contract, and therefore I think as far as that feature of the case is concerned the defendants are entitled to a ruling instructing the jury to return a verdict in their favor for possession of this property.

And thereupon in furtherance of the above ruling so made by the court, the court instructed the jury as follows:

It is alleged in the complaint that the plaintiff elected to cancel the contract and did cancel it, and that it offered to return to the defendants the amount of money which they had advanced on the cars previously

ordered and demanded possession of the cars then on hand. The defendants admit making the contract. They deny, however, that the plaintiffs ever offered to return the money which they had advanced upon the cars, and thereupon claim that the plaintiff was not entitled to the possession of the cars at the time they brought this action, and that the action was therefore wrongfully brought, and by reason of that fact the defendants have been damaged in their business to the amount of \$25,000.00.

Now, the contract as entered into between the plaintiffs, The Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company, exercising the right given by this contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85% of the list price, or all that they were expected or required to pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars,

which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendant to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had.

To the action of the court in making the above ruling, and in giving the above instruction, and in directing the jury to find a verdict in favor of the defendants to the effect that they were entitled to a return of the cars, the plaintiff duly excepted upon the ground that under the pleadings in this case a demand was unnecessary and a tender of the money representing the value of the cars was unnecessary, and that there was sufficient evidence of such tender, which exception was duly allowed, and in support of the grounds of plaintiff's exception to the action of the trial court in so directing a verdict in favor of the defendants, the plaintiff hereto attached to this bill of exceptions a true and correct transcript of all the evidence taken upon the trial of the above entitled cause, duly certified to as such by the reporter taking the same, and hereby refers to such

transcript of evidence, and by such reference incorporates the same in this its bill of exceptions and makes the same a part of this its bill of exceptions, to the rulings of the court made in the above entitled cause.

In this relation it is hereby certified that there were in the hands of the court seventeen (17) written requests for instructions, which had been prepared and submitted to the court by the plaintiff prior to the arguments of counsel to the jury among which appeared the following:

IV.

I instruct you that the payment to defendants of advancements on said automobiles by defendants before taking possession of the same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment.

VI.

I instruct you that the Limited Agency Contract between plaintiff and defendants Eugene Ford Auto Company, is a consignment contract and that by virtue of said contract plaintiff upon returning or offering to return the advancements made on the consigned automobiles in question, was entitled to the immediate possession of said automobiles.

VII.

In this case the plaintiff in addition to asking for the possession of said automobiles asks for \$1000.00

damages for the detention of the same. If you find from the evidence that plaintiff is entitled to the possession of the automobiles in question and has been damaged by their detention, then you should give plaintiff damages and may fix the damages in such an amount as you think will fairly compensate plaintiff for said detention, the amount, however, not to exceed \$1000.00.

To the refusal of the court to give said instructions the plaintiff excepted, which exception was allowed.

The instructions of the court to the jury, in full, follow:

Gentlemen of the Jury: The case to be submitted to you is an action brought by the Ford Motor Company against Winchell and Hathaway and others to recover possession of some thirty-seven automobiles. The plaintiff claims and alleges in its complaint that in September, 1915, it entered into a contract with Winchell and Hathaway, by the terms of which the latter should become the sales agents of the plaintiff company for the sale of its cars in certain designated territory, with their head office at Eugene. That the contract provided that it might be cancelled or revoked at any time by the plaintiff company without cause, and that in case it was so revoked that the plaintiff would be entitled to the possession or return to it of any cars thereunder which Winchell and Hathaway had on hand at the time, upon the payment to them of the money advanced by them on such cars.

It is alleged in the complaint that the plaintiff elected to cancel the contract and did cancel it, and that it offered to return to the defendants the amount of

money which they had advanced on the cars previously ordered and demanded possession of the cars then on hand. The defendants admit making the contract. They deny, however, that the plaintiffs ever offered to return the money which they had advanced upon the cars, and therefore claim that the plaintiff was not entitled to the possession of the cars at the time they brought this action, and that the action was therefore wrongfully brought, and by reason of that fact, the defendants have been damaged in their business to the amount of \$25,000.

Now, the contract as entered into between the plaintiff, The Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company exercising the right given by this contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85% of the list price, or all that they were expected or required to pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them

of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50, but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had.

So that the first question for you to determine will be what the value of these cars is. The plaintiff says that they are worth \$16,077.50. That is the amount the defendants paid for them. The defendants, on the other hand, claim and allege that the cars were worth \$18,555.25, which, I understand from the testimony to be the retail price of the cars, as specified in the contract between the parties.

Now, it is for you to determine from the testimony, in this case what was the reasonable value of these cars, and that amount must not be less than the sum admitted by the plaintiff, which is \$16,077.50, and it must not be more than the amounts claimed by the defendants,

which is \$18,555.25. So you will ascertain that amount and insert it in your verdict.

Then the next question will be whether or not the defendants are entitled to damages, from the plaintiff by reason of the fact that the plaintiff wrongfully took possession of these thirty-seven cars. The defendants allege that the effect of the plaintiff's action was to put them out of business—destroy their business—and that by reason of that fact they were damaged in the sum of \$25,000, and they are asking at the hands of this jury a verdict for the return of these cars and for damages they suffered or claim to have suffered on account of the wrongful act of the plaintiff in taking possession of the cars. That is a question of fact for you to determine from the testimony what damages if any the defendants suffered; what was the damage to the defendants' business by reason of the fact that the plaintiff wrongfully took from their business these thirty-seven cars.

Now, in arriving at a conclusion on that subject, it is proper for you to take into consideration the nature and character of the business in which these defendants were engaged at Eugene at the time these cars were taken and determine, if you can, what effect in dollars and cents the taking from them of these thirty-seven cars had upon that business. You should also keep in mind the fact that this contract between the plaintiff and the defendants would expire by limitation on the 31st of July, which was two months after these cars were taken, therefore, the defendants could not, under any circumstances, claim the right to act as the agent

of the Ford Company under this contract, or any contract, longer than the 31st of July, 1916, or two months after this transaction.

Again, in estimating the amount of damages to which the defendants are entitled, if any, you should bear in mind the fact that this contract had in fact been legally cancelled prior to the time the plaintiff took possession of these cars. As I said a moment ago, the contract provided that it might be revoked or cancelled at any time by either party without cause, and the Ford Motor Company had exercised its option and right under this contract and had cancelled it, so that it was at an end before they took possession of these cars, and therefore, at the time the cars were taken, the defendants were in the position of doing a garage business at Eugene without any contract with the Ford Company, and in possession of thirty-seven Ford cars, to which they were entitled. Now, the question is what was the damage to that business under these circumstances, caused by the plaintiff taking these thirty-seven cars wrongfully from the possession of the defendants.

Now the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of these thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent if you can arrive at that conclusion. They allege in their answer that their business was paying an income of \$300.00 a month and that they were

deprived of that income by reason of the wrongful acts of the plaintiff company.

Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants of course deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that of course was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would of course be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same time twice in the item of damages.

Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture but upon the facts and circumstances of the case, as disclosed by the testimony.

You are the judges, gentlemen, of all questions of fact in this case. You are the judges of the credibility of the witnesses, and it is for you to determine what weight is to be given to the testimony in this case and

what conclusions are to be derived therefrom. There was evidence during the trial tending to show that after this action had been begun the plaintiff company made a payment of some kind to the bank at Eugene, not very clear from the testimony what it was nor how it came to be made, but in any event it is wholly immaterial because the controversy here is over the right to the possession of these cars, and damages, if any, the defendants suffered by reason of the fact that the plaintiff wrongfully took them. The other question is not here for the consideration of the court and jury at this time, and need not enter into your deliberations.

There has also been something said during the trial about a deposit made by the defendants with the plaintiff company at the time this contract was entered into. The contract contains a provision to the effect that the defendants would deposit with the plaintiff company a certain sum of money necessary for certain liabilities and to secure certain liabilities. Now, that matter is not before the jury. There is no issue here in this case about that. There is nothing said in the pleadings about it, and there is no testimony here to show whether or not there is any offset against this \$800.00. And the same may be said on the question of bonus. There has been something said during the trial about the defendants having earned a bonus, and to which they are entitled, but that question is not in this record. There is no mention made of it in the pleadings and it is not an issue for consideration by this jury. The only question here is the right to the possession of these cars, and the damages, if any, which the defendants suffered by reason

of the wrongful taking of the cars from their possession by the plaintiff. The other questions, if there are questions between these parties, will have to be determined in some other proceedings and not in this replevin action.

The jury thereupon retired to consider their verdict and having returned into court with a verdict for the defendants, the plaintiff within the time provided for by rules of court, moved for time up to and including the 11th day of October, 1916, within which to file a motion for a new trial in the above entitled cause, and thereafter and on October 9th, 1916, upon motion for a further extension of time within which to file a petition for a new trial, the time to file a petition for a new trial was extended up to and including the 10th day of November, 1916, and thereupon and on the 8th day of November, 1916, and within the time allowed by order of court, the plaintiff filed its petition for a new trial and for a modification of the judgment in the above entitled cause of which petition the following is in words, letters and figures a copy, to wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Ford Motor Company, a corporation,

Plaintiff,

vs.

E. A. Farrington, V. W. Winchell and

F. M. Hathaway, et al.,)

Defendants.

PETITION FOR NEW TRIAL OR MODIFICATION OF JUDGMENT.

Comes now the plaintiff in the above entitled action appearing by Messrs. Platt & Platt and E. L. McDougal, its attorneys of record, and petitions the court for a new trial in the above entitled action and for grounds of such petition alleges:

I.

That it appears from the undisputed testimony introduced upon the trial of the above entitled cause that the plaintiff was compelled to and did pay to The First National Bank of Eugene, Oregon, three notes of the defendants V. W. Winchell and F. M. Hathaway, aggregating the sum of \$12676.38, each of which notes was secured by a chattel mortgage on the automobiles sought to be recovered from the possession of the defendants in the above entitled action, which notes the plaintiff was compelled to pay and did pay in order to free the automobiles in controversy from the liens of the chattel mortgages given to secure said notes, in order to enable it to maintain an action for the replevin of said automobiles, and the court failed and refused to instruct the jury at the trial of the above entitled action that the plaintiff was entitled to off-set the amounts paid in satisfaction of said notes against any amounts which they might find in favor of the defendants and against the plaintiff.

II.

Plaintiff petitions for a new trial in the above entitled action upon the further ground that the verdict of the jury made and entered in the above entitled action and the judgment entered thereon contravenes the instructions given by the court upon the trial of the above entitled cause in that it allows to the defendants as damages profits on the sales of automobiles in addition to the value of the cars therein and thereby expressly fixed at the sum of \$16,077.50, and said judgment is contrary to the evidence introduced upon the trial of the above entitled cause in that it appears from the undisputed evidence introduced upon the trial of the above entitled cause and the law applicable to the facts proven as evidenced by the instructions of the court made upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are not entitled to any damages arising from the action of the plaintiff in terminating its contract or in asserting its right to the possession of the automobiles in controversy, and that no evidence was introduced upon the trial of the above entitled cause upon which any claim for damages for the sum of \$6,000, or any sum in excess of \$2414.75 could properly be based, and said verdict and judgment are contrary to the evidence introduced upon the trial of the above entitled cause, and that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the defendants, V. W. Winchell and F. M.

Hathaway, had sold their business to a third party at or about the time of the cancellation of their contract with the plaintiff in the above entitled cause and received for such transfer a valuable consideration.

III.

That the verdict rendered against the plaintiff in the above entitled cause is contrary to and against the weight of evidence introduced upon the trial of the above entitled cause.

IV.

Plaintiff further petitions the court for an order modifying the judgment entered in the above entitled cause on the 11th day of September, 1916, by off-setting against the sum of \$16,077.50, therein awarded to the defendants in lieu of the machines sought to be replevined in the above entitled action the sum of \$12676.38, being the amount of money paid by the plaintiff to The First National Bank of Eugene, Oregon, for the benefit of and in payment and discharge of the three notes of the defendants, V. W. Winchell and F. M. Hathaway, given to The First National Bank of Eugene, Oregon, as payee, each of which said notes were secured by a chattel mortgage upon the automobiles sought to be replevined in the above entitled action, which facts appear from the undisputed evidence introduced upon the trial of the above entitled cause, and for grounds of such petition alleges that the plaintiff was compelled to and did pay the said notes of the defend-

ants, V. W. Winchell and F. M. Hathaway, the first note being in the sum of \$2,800 bearing date April 22nd, 1916, the second note being in the sum of \$2.800 bearing date May 1st, 1916, and the third note being in the sum of \$8,400 bearing date May 24th, 1916, each of which notes was secured by a chattel mortgage upon the property sought to be replevined in the above entitled action, in order to free the property involved in the above entitled cause from the liens of said mortgages prior to the institution of its action for the replevin of said automobiles.

V.

Plaintiff further petitions for an order of this court modifying the judgment heretofore entered in the above entitled cause on the 11th day of September, 1916, by striking therefrom the sum of \$6,000 allowed to the defendants as damages on account of the alleged erroneous action of the plaintiff in taking possession of the automobiles involved in the above entitled controversy upon the grounds and for the reason that such is not a proper item of damage, because, it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the plaintiff had a legal right to and did terminate its contract with the defendants, V. W. Winchell and F. M. Hathaway, prior to the institution of the above entitled action, and the defendants are, therefore, not entitled to any damages arising from the action of the plaintiff in asserting its rights to the possession of the automobiles in controversy and its termination of its contract with the defendants V. W. Win-

chell and F. M. Hathaway, and that no evidence was introduced upon the trial of the above entitled cause upon which any claim or judgment for damages in the sum of \$6,000 could properly be based, and that such allowance of \$6,000 for damages, or any other sum in excess of \$2414.75 is in contravention of the instructions of the court directing the jury that they should not allow the value of the machines in controversy and at the same time allow any claim for loss of profits arising from an inability to sell said automobiles, and upon the further grounds that it appears from the undisputed evidence introduced upon the trial of the above entitled cause that the business of the defendants, V. W. Winchell and F. M. Hathaway, had been sold to a third party at or about the time of the cancellation of the said defendants' contract with the plaintiff in the above entitled action, and said defendants received therefor a valuable consideration.

PLATT & PLATT and

E. L. McDOUGAL,

Attorneys for Plaintiff."

which said petition for a new trial was, after argument by the respective counsel for plaintiff and defendants, and after due consideration by the Court, denied by the said Court on the 2nd day of January, 1917, to which ruling the plaintiff then and there excepted, which exception was allowed.

Copy of Transcript of Testimony attached to Bill of Exceptions.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company,

Plaintiff,

vs.

Winchell & Hathaway,

Defendants.

Portland, Oregon, Tuesday, September 5, 1916, 10 a.m.

E. L. McDougal, for plaintiff.

I. N. Smith, L. Bilyeu, and Mr. Hardy, for defense.

R. S. BEAN, District Judge.

MR. McDOUGAL: An amended complaint was filed, and it was agreed between counsel for the defendants and myself that the answer to the first complaint should stand as the answer to the amended complaint, and the reply filed by the plaintiff to the defendants' answer should stand as the reply to the answer in the first instance.

In addition to that, there is a clerical error on page 3, line 2 of the amended complaint. I used the word, in the second line "property" when I meant to use the word "advancements," and I would ask the Court at this time for permission to strike out the word "property" and insert the word "advancement."

FREDERICK B. NORMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Norman, what was your position with the Ford Motor Company on or

about the month of May and June, 1916?

A. Local manager for this territory.

Q. Your headquarters at what town?

A. Portland.

Q. As local manager, will you state whether or not the territory of Lane County, Oregon, was embraced in this district?

A. It was.

Q. Are you acquainted with Mr. Winchell and Mr. Hathaway, the defendants in this case?

A. I am.

Q. Will you state in what capacity, if any, they represented the Ford Motor Company at Eugene.

A. Agents.

Q. Here is a contract. Will you identify it and see if it is the signature of yourself.

A. Yes, sir.

Q. And Mr. Winchell and Mr. Hathaway.

Contract offered in evidence, received without objection and marked PLAINTIFF'S EXHIBIT 1.

PLAINTIFF'S EXHIBIT 1.

1915—LIMITED AGENCY CONTRACT—1916

THIS AGREEMENT, made at Highland Park, Michigan, this 10th day of September, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party, and Eugene Ford Auto Co., of Eu-

gene, in the State of Oregon, hereinafter known as the second party, WITNESSETH:

WHEREAS the first party is the manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

WHEREAS the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

NOW, THEREFORE, this witnesseth:

APPOINTMENT AS LIMITED AGENT

(1) That first party hereby appoints second party its "Limited Agent" with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS

(2) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

AUTOS ON CONSIGNMENT

(3) That first party will consign its Ford automobiles to second party to be sold to users only, and

not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

TERRITORY

(4) The second party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely:

The entire territory, including that of the Sub-Limited Agents, shall consist of the following, namely:

(4) All of Lane County except extreme Western portion of townships in R-10-W, R-11-W, and R-12-W; portion of Douglas County Tier, T-19-s in R-6-W to R-9-W; Tier T-20-S R-4-W to R-9-W; Tier T-21-S, R-4-W to R-9-W inclusive. Portion Lane County as follows: T-15-S R-9-W, T-16-S R-8-W, T-16-S R-9-W, Tier of (288 cars) T-15-S R-1-W and R-1-E to R-8-E; Tier T-16-S, R-1-W to R-3-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-16-S R-1-E to R-8-E inclusive. Tier T-17-S R-1-W to R-9-W inclusive. Tier T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier (170 cars) T-17-S R-1-E to R-8-E inclusive. Tier T-18-S R-5-W to R-9-W inclusive. Tier T-18-S R-1-E to R-7-E inclusive. Tier T-19-S R-1-E to R-7-E inclusive. T-19-S R-7-W north half of T-18-S R-1-and 2 W. Portion of Northern part of Douglas County, being townships lying north of Tier T-22-S within Ranges 4-W to 9-W, southern

part of Lane County lying south of Tier T-19-S; also Tier T-19-S in R-1-W to R-6-W inclusive. The southern half of T-18-S R-1-W and T-18-S in R-2-W, Tier T-15-S and Tier T-16-S in R-4-W to R-7-W inclusive, also the town of Springfield. (118 cars)

The retail territory, that is, the territory wherein second party arranges direct sales (and in which no Sub-Limited Agents are appointed) consists of the following, namely:.....

The remainder of said entire territory shall be known as wholesale territory wherein shall be appointed Sub-Limited Agents as hereinafter provided, namely:.....

RESIDENCE DEFINED

In this connection, it shall be construed that a purchaser resides at either (a) his legal domicile; (b) the place where he sojourns for not less than three consecutive months; (c) his permanent place of business or occupation; or (d) either home where more than one is maintained. The decision of the first party in all violations of this sub-division shall be final and conclusive, with no recourse or appeal on the part of the second party.

DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS

(5) The sales of Ford automobiles to residents outside of second party's own territory is a serious trespass upon the rights and earnings of other Limited Agents and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, and therefore, for any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of Two hundred fifty dollars (\$250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

PRICES

(6) Second party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 Dollars (\$53.25) for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List price" are used

herein they mean the latest retail selling price established or fixed by the first party.

SALES OF AUTOS FOR CASH ONLY

(7) Second party shall arrange all sales of Ford automobiles for cash only; but if second party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own account solely, and he must remit cash only to first party.

REBATES FORBIDDEN

(8) Second party will not render any services or supply any goods either gratis or at reduced prices, nor do or permit any act whatsoever either directly or indirectly, or through other parties, that would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, plus freight and delivery charges, and said United States tax or excise, if any, and in the event of a breach or violation hereof, second party shall pay to the first party the sum of Two hundred fifty dollars (\$250.00) for every such breach or violation as and for liquidated damages arising to the first party and its business by reason of such breach or violation, or the same sum may be deducted from any moneys in first party's hands belonging to second party or which first party may owe, for business done, to second party. First party may also cancel this contract for any such violation.

CHANGES IN PRICES

(9) The first party may change the list prices of any of its products at any time it may choose, and second party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices, first party shall not be bound to make any allowance to second party in cases of automobiles shipped before such changes take effect, and the second party's commission on automobiles as yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price; provided, that in case of a reduction in price the first party will allow to second party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the second party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

ADVANCES

(10) Second party shall advance in cash to first party eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles by first party to second party.

FREIGHT

(11) Second party shall pay the freight from Detroit or branch factory and advance freight, if any, as the case may be, to second party's place of business.

TITLE OF AUTOS

(12) First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

LIEN FOR ADVANCES—INSURANCE

(13) Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and he shall keep and maintain insurance so as to protect himself against loss.

RETAIL BUYERS' ORDERS

(14) Second party shall take from each proposed purchaser of a Ford automobile and immediately forward to first party, a written order duly signed by him, upon the regular blank "Retail Buyer's Order," furnished by first party, without alterations or changes except the filling in of blanks, and second party will make

no arrangement for the sale of a Ford automobile without taking such written signed order.

DEPOSITS ON AUTOS

(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with the Retail Buyer's Order to the first party, who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

COMPANY MAY REJECT ORDERS

(16) The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

WEEKLY REPORTS OF BUSINESS

(17) The second party shall report each week to first party all Ford automobiles contracted for by him with purchasers under this agreement, including all sales by Sub-Limited Agents and their purchasers, giving

motor number and description of each automobile sold or contracted for, the date of sale and full name and address of each purchaser.

WARRANTY

(18) Second party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyer's Order and Bill of Sale in that behalf. Second party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party will contain the only warranties of parts or accessories made by first party.

REPRESENTATIONS

(19) The second party shall make no representations as to Ford automobiles or parts or accessories, except the same as are set forth in the printed literature issued by the first party. If second party violates these provisions he may be personally liable, but shall not in any wise bind the first party.

CLAIMS AGAINST CARRIERS

(20) In case of damage to automobiles by carriers in transit to second party, collection from the carrier shall be made in the name of the first party as the owner of such automobiles—but as between the parties hereto, the second party shall be entitled to eighty-five per cent

(85%) of the amounts realized, less the like proportion of expenses of collection, or the first party may, at its option, assign to second party all its claims in such matter, whereupon second party shall present and prosecute his own claim without any liability of the first party, and it is stipulated that first party shall not be liable to the second party for any injury or damage to the automobile after it is once delivered to the carrier or for any return of the advances thereon.

KEEP PLACE OF BUSINESS

(21) That second party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Eugene for the purpose of conducting such Limited Agency business, and shall employ competent and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall second party have any authority to render first party responsible for the rent, taxes, wages, or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

THEFT OR DAMAGE TO AUTOS. WILL SELL ALL AUTOS. CLAIMS BY THIRD PERSONS

(22) Second party shall safely keep and he hereby agrees to save first party harmless against them for dam-

age of any kind to said Ford automobiles while in his possession under consignment, and in consideration of his being granted this agency, he expressly agrees that he will bear all damages or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while in his possession, or while in transit from first party to second party. Inasmuch as first party bases its output and expenditures upon the orders given by its Limited and Sub-Limited Agents, therefore, and in consideration of this contract the second party hereby agrees to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, of all the automobiles consigned and delivered to him pursuant to his orders for the same, and first party shall not be liable to return to second party his advances on same. The second party also agrees to save first party harmless against any and all claims made against first party by any person or persons not parties hereto for damages arising out of the conduct of second party's said business or Limited Agency whether from accident or injury or collision or loading or unloading or driving or theft or fire or from any cause of any and every nature whatsoever.

TAXES

(23) The second party shall, as a part of the expenses of his business, pay any taxes that may be levied upon or against or on account of such business or his stock, or of any of such automobiles as may be in his possession or in transit on bill of lading, or otherwise, for delivery to him.

SIGNS, ADVERTISEMENTS

(24) The second party agrees to conspicuously display signs on and in his building and windows, designating that he is the "Limited Agent for Ford cars" for the territory specified herein and he shall advertise the first party's product effectively in the local papers and give his immediate and careful attention to all inquiries, and give good representation to all interests of first party in the territory aforesaid. Second party agrees not to advertise or trade in the first party's product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sub-Limited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of second party is cancelled or terminated he agrees to remove all such signs and cease such advertising.

REPAIRS, NUMBER PLATES, ETC.

(25) Second party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number, or other numbers or marks affixed to any Ford automobile, or suffer the same to

be done, and that he will not materially change any automobile consigned to him by the first party.

DEMONSTRATOR

(26) Second party agrees to purchase from first party for himself and keep in use at all times at least one Ford automobile of the current year's model, for the sole purpose of demonstration and exhibition to intending purchasers and to maintain same in proper running condition and good, clean order and repair at all times. If he sells said automobile before the same has been in actual use three months, second party agrees that he will sell the same at the full advertised list price only, and within his own territory only, as provided in sub-divisions four, six and eight hereof. For any breach of this provision the second party shall pay to first party Two hundred fifty dollars (\$250.00) as reasonable liquidated damages. The only warranty of such demonstrating or service cars by the first party is agreed to be the same as that given by first party on automobiles sold to the general public and which is printed on the Retail Buyer's Order.

PATENTS

(27) First party owns, and the Ford automobiles are manufactured under, and embody the following letters patent of the United States or some of them, namely:

United States letters patent No. 747,909 issued December 22, 1903.

United States letters patent No. 773,934 issued November 1, 1904.

United States letters patent No. 787,908 issued April 25, 1905.

United States letters patent No. 847,405 issued March 19, 1907.

United States letters patent No. 879,757 issued February 18, 1908.

United States letters patent No. 1,005,186 issued October 10, 1911.

United States letters patent No. 1,012,620 issued December 26, 1911.

United States letters patent No. 1,044,038 issued November 12, 1912.

United States letters patent No. 1,066,729 issued July 8, 1913.

United States letters patent No. 1,073,569 issued September 16, 1913.

United States letters patent No. 1,075,557 issued October 14, 1913.

United States letters patent No. 1,078,042 issued November 11, 1913.

United States letters patent No. 1,098,361 issued May 26, 1914.

and of applications for letters patent now pending and undetermined. First party further owns, and Ford automobiles, parts and accessories are manufactured and sold under and embody the exclusive right to the use of

the name "FORD" acquired by and through United States copyright and trademark registration numbers 74,530, issued July 20th, 1909 (script word "FORD"), and 98,655, issued July 28th, 1914 (winged pyramid design), together with the rights acquired and established thereto by and through fair trade and trade user. The validity of each of said patents and of the said copyright, registration and trade user rights, and of the claims of the first party under said applications is hereby expressly admitted; and it is agreed that the sale and use of said automobiles as delivered to the second party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that second party's right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that no person shall acquire the right to use said automobiles or to own the same if there be any violation of the territorial or price restrictions set forth herein; and any such violation shall constitute an infringement of each and every of said patents, applications and inventions.

COMMISSIONS

(28) As second party's commission for making such sales of Ford automobiles, first party will, after payment by the purchaser, allow to second party (except in the cases specified in sub-division nine hereof)

fifteen per cent (15%) of such full advertised list price, and will allow to second party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

ADDITIONAL COMMISSIONS

(29) First party agrees to allow and pay to second party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement, upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than \$5,000.00, but when the second party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of \$5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: On all such business totaling less than \$10,000.00, one per cent (1%); if \$10,000.00 and less than \$20,000.00, two per cent (2%) on all such business; if \$20,000.00 and less than \$35,000.00, three per cent (3%) on all such business; if \$35,000.00 and less than \$50,000.00, four per cent (4%) on all such business; if \$50,000.00 or more, five per cent (5%) on all such business. That is, for illustration, if he shall have done \$7,000.00 total business as above described, his commission shall be one per cent (1%) on all of such \$7,000.00. If, for illustration, his total business as above described shall be \$34,900.00, his commission shall be three per cent (3%) on all of such \$34,900.00. If \$49,-

900.00, then four per cent (4%) upon all of such \$49,900.00; if it shall total \$50,000.00, then five per cent (5%) on all of such \$50,000.00, and likewise five per cent (5%) upon all such business over \$50,000.00.

If any payments shall have been made to second party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to, such payments shall be credited on the final amount owing him and shall be deducted when he becomes entitled to and shall receive the higher percentages.

PAYMENTS TO SUB-LIMITED AGENTS SECURED

(30) It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing or which may later become due or owing the Sub-Limited Agents under the second party have been fully paid, or until satisfactory arrangements are made with the first party to insure Sub-Limited Agents being paid the commissions and added commissions which may be due or become due to them under their respective contracts.

COMPANY MAY SELL DIRECT

(31) First party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of

the automobile or automobiles so sold, after it shall have received the full purchase price in cash, to the second party, or if there shall be a Sub-Limited Agent in that special territory and locality where such sale is made, then such five per cent (5%) shall be paid to such Sub-Limited Agent. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through Sub-Limited Agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Sec. 4 of this agreement. First party shall not pay any commission to second party or his Sub-Limited Agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory.

STOCK OF FORD PARTS

(32) Second party agrees that he will purchase from the first party on his own account and carry on hand at second party's place of business aforesaid, a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Thousand Dollars (\$2000.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as second party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford cars is often injured by the use therein of inferior

parts not made or furnished by the Ford Motor Company, therefore, the second party also hereby agrees that all his purchases of parts for Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

DISCOUNT ON PARTS

(33) First party agrees to allow the second party a discount of twenty-five per cent (25%) on all parts of Ford automobiles listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of second party's agreement to carry stock as provided in sub-division thirty-two above, and in consideration of the other provisions of this contract.

First party agrees to allow second party an additional discount of ten per cent (10%) on all Ford parts sold by second party at wholesale to Sub-Limited Agents under him; said additional ten per cent (10%) to be credited by first party monthly on receipt by it of certified itemized statement of such sales and deliveries made during the previous month by the second party.

RETURN OF PARTS

(34) The second party shall have the right and privilege of returning to first party at the place of purchase at any time during the term of this contract, or

within thirty days after its cancellation or expiration, but at his own expense, for credit at the purchase price, all such new parts of first party's automobiles as he may desire, except bodies, tops, tires, lamps, generators, speedometers, windshields, and other equipment known in the trade as "accessories" provided same are in as good condition as when sold by the first party to the second party.

COMPANY MAY SELL PARTS

(35) First party reserves the right and privilege to sell and deliver or cause to be sold and delivered any parts of Ford automobiles, repairs, accessories or other goods that may be ordered from it by any person or persons within the territory covered by this agreement, without the payment of any profit or allowance or any discount or credit whatever to the second party upon such sales. It is expected and intended that second party will carry the stock of Ford parts, repairs and accessories as herein provided, and that nearly all orders for such parts, repairs and accessories will be placed with him by all persons in the above described territory.

CLAIMS

(36) It is further agreed that no claims regarding errors in shipments or billings are to be recognized by first party, unless received in writing by it from the second party within ten days after receipt of the goods by the second party.

CRATING, ETC. EXTRA

(37) The first party will be entitled to receive an extra charge for crating, packing, double decking and loading, which the second party shall stand and pay as a part of the expenses of conducting his business.

DELAYS IN SHIPMENTS

(38) The first party shall not be liable in any way for delayed shipments of any goods ordered or on account of shipments by any other than a specified route.

PAYMENTS AT HOME OR BRANCH OFFICE

(39) The second party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by second party.

DEPOSITS

(40) As a guarantee of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of Eight Hundred Dollars (\$800.00) in cash, and it is agreed that the first party

may, at its option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

ESTIMATE OF AUTOS REQUIRED

(41) In order that first party may determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the second party agrees that he will require consignments of not less than 288 Ford automobiles for his said entire territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely:

For his wholesale and retail territory respectively, as follows:

In August, 1915, Wholesale Territory	22 Autos
In August, 1915, Retail Territory	8 Autos
In September, 1915, Wholesale Territory	16 Autos
In September, 1915, Retail Territory	24 Autos
In October, 1915, Wholesale Territory	2 Autos
In October, 1915, Retail Territory	24 Autos
In November, 1915, Wholesale Territory	0 Autos
In November, 1915, Retail Territory	8 Autos
In December, 1915, Wholesale Territory	0 Autos
In December, 1915, Retail Territory	8 Autos
In January, 1916, Wholesale Territory	18 Autos
In January, 1916, Retail Territory	16 Autos
In February, 1916, Wholesale Territory	0 Autos
In February, 1916, Retail Territory	8 Autos
In March, 1916, Wholesale Territory	2 Autos
In March, 1916, Retail Territory	38 Autos
In April, 1916, Wholesale Territory	24 Autos
In April, 1916, Retail Territory	24 Autos
In May, 1916, Wholesale Territory	8 Autos
In May, 1916, Retail Territory	16 Autos
In June, 1916, Retail Territory	6 Autos
In June, 1916, Wholesale Territory	8 Autos
In July, 1916, Wholesale Territory	8 Autos
In July, 1916, Retail Territory	0 Autos

REQUISITIONS MAY BE DECLINED

(42) First party agrees that the foregoing requisitions of the second party will receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right

to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever in the manufacture and delivery of its product—no legal liability to fill such requisition being incurred under any circumstances. And the second party may cancel, upon one month's full written notice to first party, the said requisitions, or what remains unfilled thereof.

PRICE MAY BE CHANGED

(43) It is further agreed that the foregoing requisitions for consignments of Ford automobiles are given by second party and received by first party subject to the express condition that prices are subject to be changed by the first party at any time during the year and deposits are so accepted; in the event of changes, however, the second party may cancel such remaining requisitions, and may demand and receive back from the first party such deposits as may have previously been made, less any amounts for which second party may be obligated or owing either directly or indirectly to the first party.

SUB-AGENCIES

(44) Second party shall appoint a Sub-Limited Agent or establish a properly equipped branch or garage for the sale and repair of Ford automobiles in every such city or town within the above described territory as shall at any time or from time to time be designated by

first party, in order that first party shall have adequate representation therein, and so that the public shall have at hand facilities for purchasing Ford automobiles, parts, repairs, accessories and supplies, and if second party fails to secure such Sub-Limited Agents, or establish branches as herein provided, then first party may do so, or first party may take such territory entirely away from second party, or first party may sell direct its automobiles, parts, accessories, etc., in such unoccupied territory, in any of which cases the second party shall not claim or be entitled to any commissions on business so handled.

SUB-LIMITED AGENTS' COMMISSIONS SUB-LIMITED AGENTS' CONTRACTS

(45) The second party shall allow and pay the Sub-Limited Agents the regular Limited Agent's commissions on the net volume of business done, and will require each Sub-Limited Agent to execute the Sub-Limited Agent's agreement provided in blank by first party in triplicate, and shall within three days after the execution thereof transmit in triplicate said agreement, properly executed, to first party for its approval and signature, and upon being executed by the first party, one copy each shall be delivered and kept by the first party and second party hereto and said Sub-Limited Agent. No arrangement or agreement made by second party with any Sub-Limited Agents shall be in any manner binding upon the first party until it shall have been reduced in writing on such blank aforesaid and ap-

proved and signed in triplicate by first party's duly authorized executive officer and delivered as aforesaid, and second party further agrees not to enter into any private arrangement or agreement with any party or parties to act as his Sub-Limited Agent except as herein provided. All Ford automobiles sold by first party through the Sub-Limited Agents of the second party, appointed and authorized as aforesaid, shall be considered as taken by the second party as a portion of the Ford automobiles handled by him under this contract.

DEPOSITS OF SUB-LIMITED AGENTS

(46) The first party shall be custodian of all contract deposits made by the Sub-Limited Agents and of all deposits made by proposed buyers, and in the event of the termination or cancellation of this contract, second party shall have no claim whatsoever directly or indirectly against first party, for such deposit moneys, whether such deposits are made through the second party or directly by the Sub-Limited Agents or buyers themselves. When deposit moneys are transmitted to the first party by the second party, second party shall specify whose money the same is, and on what particular contract or Retail Buyer's Order such deposit is being made.

NO ASSIGNMENT

(47) The second party shall have no right to assign this contract, or any interest in the same, without the written consent of the first party.

CANCELLATION

(48) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

SALE OF AUTOS ON HAND AT TIME OF TERMINATION

(49) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided however, if, after reasonable effort on the part of second party to make such sale there shall remain on

hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

PERFORMANCE OF SUB-LIMITED AGENCY CONTRACTS

(50) In case of cancellation of this contract first party will carry out all such contracts made with Sub-Limited Agents under the second party, as were made with the approval of the first party as herein provided, the intent being that the first party shall take the same off the hands of second party.

TERMINATION

(51) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract

NO WAIVER OF THESE PROVISIONS

(52) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the second party of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

MICHIGAN CONTRACT

(53) This contract, it is agreed, is a Michigan contract and shall be construed as such.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Signature of the First Party

FORD MOTOR COMPANY,

By *W. A. Ryan-A.* (L. s.)

Manager of Sales.

Approved *F. B. Norman,*

Branch Manager.

O. K.'d *J. S. Beckhardt,*

Accounting.

Ckd. and App. *E. W.,*

Sales.

Signature of the Second part

Eugene Ford Auto Co. (L. s.)

By F. M. Hathaway (L. s.)

Witness *Chas. E. Godon,*

First National Bank.

(Name of Limited Agents Bank)

Trial balance, July 31, 1915.

C. R., Aug. 13, 1915, page 15.

C. R., Sep. 9, page 40.

MR. McDOUGAL: I also desire to offer in evidence letter dated May 25, 1916, signed Ford Motor Company, F. B. Norman, manager, admitted to have been received by the Eugene Ford Auto Company, at Eugene, Oregon, through registered mail.

Marked PLAINTIFF'S EXHIBIT 2.

Portland, May 25th, 1916.

Eugene Ford Auto Company,

Eugene, Oregon.

Gentlemen: In accordance with the provisions of Sub-divisions 46 and 47 of your contract, notice is hereby given of the cancellation of your Limited Agency Contract with the Ford Motor Company, effective as of this date.

In this connection, attention is called to Sub-division 47 of the contract relating to the winding up of the

affairs of the Limited Agency in the event of the cancellation of the contract. Ford Motor Company,
F. B. Norman, Manager.

CROSS EXAMINATION

Questions by Mr. Hardy: Did you not send a telegram previous to sending the letter?

A. Yes, sir.

Q. A telegram stating—

MR. McDOUGAL: If the Court please, I object. The telegram is the best evidence.

Q. Have you the original of that telegram?

A. I have not.

Q. Did you keep an office copy?

A. Yes, I imagine so.

Q. Can you produce it?

A. I don't know. I think so.

Q. I would like to have you produce it, if you please.

A. Yes.

MR. McDOUGAL: We will produce it if we can find it.

Witness excused.

CHARLES E. GODEN, witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Now, Mr. Goden, in what capacity were you employed by the Ford Motor Company during the months of May and June, 1916?

A. Territory representative.

Q. Are you acquainted with the defendants, Mr. Winchell and Mr. Hathaway, in this case?

A. I am.

Q. Were you down to see Messrs. Winchell and Hathaway prior to the time that this registered letter was mailed to them by Mr. Norman?

A. Any date prior, you mean?

Q. I will just withdraw that question. Were you down to Eugene to interview Messrs. Winchell and Hathaway subsequent to May 25th, the date upon which this registered letter was mailed to Winchell and Hathaway, cancelling their contract?

A. About that date, yes, sir.

Q. For what purpose did you go down there?

A. Instructions from the Ford Motor Company, my manager, Mr. Norman, to go there and displace them as agents, and place Vick Brothers in that territory.

Q. What did you do when you first went down there?

A. Well, I got in there—went to Hathaway and Winchell's office or place of business, the Eugene Ford Auto Company, and told them that I had been sent there for that purpose, cancelling the contract, and they received the registered letter at the time I was in their office. I said "That is your notification of cancellation,

which is according to the rules of the contract.” They said “Yes, we understand that; we expected it.”

Q. Now, Mr. Goden, do you recall how many Ford automobiles had been consigned to and were in possession of Winchell and Hathaway at the time they received this registered letter?

A. Thirty-six or seven; thirty-seven, I believe.

MR. McDOUGAL: I think it will be admitted, will it not, Mr. Smith, that the automobiles in the possession of the defendants at the time were the ones that are named in paragraph 6, page 2, of Plaintiff's Amended Complaint?

MR. SMITH: We will admit the identical automobiles numbered in the complaint, that is giving the factory number of the automobiles, were in our possession at the time of the commencement of the action.

COURT: Thirty-seven of them.

MR. SMITH: We have set up the same numbers on page 3 of our Answer, lines 26 to 31.

MR. HARDY: Thirty-six touring cars and one Sedan.

Q. Do you recall, Mr. Goden, the price of these cars, touring cars, F.O.B. Detroit?

A. Touring cars?

Q. Yes.

A. F.O.B. Detroit, \$440.00 at that time.

Q. At what price were they consigned to the defendants, Messrs. Winchell and Hathaway?

A. Eighty-five per cent of the retail price.

Q. Eighty-five per cent?

A. \$374.00.

Q. In addition to that did the defendants have to advance the freight and the—

A. He was supposed to pay the freight and 85% of the cost.

Q. What would that freight and the cost of assembling amount to?

A. Well, there is an allowance in the freight of four dollars for unloading, which makes the freight at that time—the retail price of the car at Eugene should have been \$493.25; \$53.25 was the freight, with the allowance for unloading the actual freight cost is \$49.25.

Q. Then the price as I understand it—the retail price to the public of a car at Eugene would be \$493.25?

A. Yes, sir.

Q. That would be the touring car?

A. Yes.

Q. And the price at which the car was consigned to the agent was 85% of that, or \$427.25.

A. Well, it was \$374.00 plus the \$49.25—

Q. And the cost of assembling?

A. '(Continuing) and this four dollar allowance for assembling.

Q. That would make \$427.25. Now, they had automobiles on hand, as stated in the complaint, to the value of \$16,077.50. What does that represent, the value of the automobiles, or rather the amount of the advancements on the automobiles by the defendants, Winchell and Hathaway?

A. It represents the cost of the automobiles to the defendants, that is the actual amount of money involved

by them at Eugene. It was on consignment account that they were put in.

Q. When you were in the office there and this registered letter was received, you said that the defendants said they expected to receive a cancellation of the contract. What further acts did you do then?

A. Why, immediately following that? Oh, I talked with the defendants, Mr. Hathaway and Mr. Winchell, in regard to the thing, that is settlement on the proposition. As I had been handling Mr. Hathaway and Mr. Winchell in the territory for some time and we had always been on very friendly relations, why we just talked the matter over, and the settlement proposition—what they were going to do about it. Well, they said they had not decided, had taken it up with an attorney. I said, “All right, if you have got this matter in the hands of your attorney, I will have to report that to the company.” I said, “I don’t know, between you and I, whether it is a proposition to take up with attorneys. Sometimes we can settle better out of it. However, if you want to go ahead with that.” And I called their attention to the clause in the contract which provided for this cancellation, and also the proviso of taking the cars back, and they said, “Where is that clause,” Mr. Winchell said. I told him and showed it to him, and he took a copy of the contract and invited me to go to the attorney’s office, and I said “No.,” I will not go to your attorney’s office. I have nothing to do with attorneys. When I go to your attorney’s office, my attorney will be with me,” and he went off with the contract.

Q. Could you find the clause of the contract that you read to them?

A. If I remember, it is 43.

Q. Just take Exhibit 1, and see if you can find the clause in the contract.

A. I think it is in 22 here—yes, it is in paragraph 49 of this contract, “Sale of Autos on hand at Time of Termination.” That is the clause.

Q. All right, just read that to the jury.

A. “49. In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.” That went along to the fact—I took this clause along to show

them they didn't have them sold until the ten per cent provided in this—

MR. SMITH: That is a point for Your Honor to decide.

A. I was just telling what I said to them.

COURT: Let him tell what he said to them.

A. Said to them at the time.

Q. Now, Mr. Goden, referring to this paragraph 49 again, which you have just read to the jury, will you state whether or not anything was said about the advancements that had been made upon these automobiles by the defendants Winchell and Hathaway?

A. At that time?

Q. Yes.

A. No, they just took that—went off to his attorney's at that time with the thing in his hand.

Q. Do you recall whether this was May 26th or what date this was?

A. No, it was around that. That date could be proved by—

Q. The letter was written May 25th and I assume—

A. I got there that time. I was in the office when it arrived, so it must have been about the 26th. My traveling expense account in the office would show the exact date I arrived.

Q. What did you do then after that with reference to closing up this contract?

A. I believe I met Vick Brothers there at the train after that.

Q. When did you next meet Winchell and Hathaway?

A. Oh, I think I saw them off and on on the street. I took some matters up with the company over the phone and—I can't remember now just exactly when I next met them. Oh! I think I met them next with Vick Brothers at their place of business, if I remember right.

Q. And who are Vick Brothers?

A. Well, Mr. Vick was there. Vick Brothers are the present agents at Salem, Oregon.

Q. Will you state whether or not at any time subsequent to May 26th you ever made any tender of the advancements on these machines by Winchell and Hathaway.

A. Before May 26th?

Q. Subsequent to May 26th.

A. Oh! yes, the company forwarded to the bank in Eugene telegram to honor my draft in payment of the \$16,077, I believe, and some odd cents—I forget just exactly the figures—in payment of a check payable to Hathaway and Winchell for automobiles, and the bank was to notify me that the check was there—the money was there at my disposal but only for that purpose—could only sign a check for return to them—for Hathaway and Winchell. The telegram specified that was the only use I could make of this money.

Q. You say you had this \$16,077.50 in the bank there at Eugene?

A. A telegram authorized the draft and the bank notified—I saw the banker and he said it was there, and that I could sign it for that purpose.

Q. Will you state whether or not you made any

effort to get this money and give it to Winchell and Hathaway.

A. Yes, I attempted to get Winchell and Hathaway, if I remember right, on the day I had the money in the bank to use, but I believe one was in Portland, or some delay, I couldn't see them until evening. I at first demurred and thought I would take it up the next morning; they said "Well, we will meet you." I said "All right, you can come to the hotel then." And they closed their place of business at six o'clock and I was at the hotel. I said "Come on up to my room, and we will talk the matter over," and Mr. Vick—yes, I believe Mr. Vick was with me. So when he got to the hotel, Mr. Hardy was with him, their attorney. They said "This is Mr. Hardy" in the lobby, and we all walked up to the room, and I said "Now, I have the money in the bank to pay you for those automobiles you have in your possession" and Mr. Winchell said "You mean cash" and I said "Yes, I have got the cash." He says "I won't do anything without I get cash from the Ford Motor Company." I said "All right, the cash is in the bank. I can't get it tonight, but will get it in the morning." He says, "You mean you can get it in the morning? It is there?" I said "Yes, it is there." I said "Are you willing to accept that?" And their attorney spoke up in the conversation, and I said "I don't recognize you. I am not talking to their attorney. I asked to talk to Mr. Winchell and Mr. Hathaway, and I don't recognize you at all in this." He says, "I am their attorney." I says "That don't make any difference, and I didn't ask you to the room." With that he started to walk out, and he says

"We will take it under advisement," and I said "No advisement in this case."

Q. Was there anything said there at that time by Mr. Hardy or any one else with reference to whether or not they understood this to be a tender?

A. Yes, I took it up with that action, that I was tendering them the money.

MR. SMITH: We move to strike out that answer, and ask to have him answer the question.

COURT: State what was said about it.

Q. (Read as follows: Was there anything said there at that time by Mr. Hardy or anyone else with reference to whether or not they understood this to be a tender?) Just answer that question.

Q. By any one else?

Q. (Read.)

A. Yes.

Q. Who said that? Who made the statement?

A. I made the statement to Vick Brothers at the time that we were going to tender them this money. We went up there. I told them to come up as a witness I was tendering this money.

Q. Well, was anything said by Mr. Hardy—

MR. SMITH: I move to strike that out; that is not responsive to the question—what he said to Vick Brothers, outside the presence of these defendants, has nothing to do with this case.

COURT: State what you said to the defendants.

A. I said "I am here for the purpose of making a tender to you of this money for these automobiles, according to the contract." And then he spoke up and

said "Well, we will take that under advisement."

Q. Did you the next day make any attempt in any way to tender this money again?

A. Not excepting meeting, I believe it was Mr. Winchell on the street, and telling him the money was ready for them if they wanted it.

Q. Was anything said by you, or any invitation extended to them to come to the bank?

A. I told them that their banker had received a telegram to that effect, that it was there. It was their same banker, you see, that got the notice.

Q. You never took this sixteen thousand out of the bank?

A. No, I didn't want to carry this around with me at night. I didn't have no use for it. I couldn't take it out unless I took it for the purpose of paying that over.

Q. And it was impossible for you to get Winchell and Hathaway to go to the bank with you? Did they refuse to go?

A. No, they didn't refuse to go to the bank; they didn't go to the bank. They knew the money was in the bank, though; that they could go there with me and get it.

Q. What did you do then after this time?

A. Why, I took the matter up with the company over the phone and told them we couldn't come to any arrangement, and if I remember right, they asked me if they couldn't make a settlement, and I said I didn't think it was possible, under the way they had the thing in their attorney's hands, and that they wouldn't make a settlement of that kind; that they were more on the

order of fighting the case. I believe the matter was then referred to you and you sent out the Marshal.

Q. Were you down there at the time the automobiles were taken over by the United States Marshal?

A. I certainly was.

Q. And will you state whether or not the Marshal took possession of these cars, you made any tender.

A. Your brother made a tender.

Q. And were you present?

A. I was present.

Q. What was done?

A. I believe Mr.—their attorney answered that he understood that; that they considered the machines in their possession, their property.

Q. Was anything said with reference to the tender, its being refused or accepted?

A. Well, from what I understood from your brother, it was refused.

Q. No, not from. In your hearing?

A. In my hearing, no. Your brother was some distance from me when he made the tender.

MR. SMITH: I move to strike out the testimony in regard to the tender on the ground it is hearsay; he doesn't know anything about it.

MR. McDOUGAL: Unless you heard it, that was improper.

MR. SMITH: I ask that the jury be instructed to disregard that.

COURT: The testimony in regard to a tender by Mr. McDougal is not competent, because he did not hear it.

Q. Mr. Goden, did you make a demand upon the defendants here for the possession of these cars?

A. No, I didn't make the demand.

Q. You at no time made any demand for the possession of the cars?

A. Not I.

Q. Do you know—or did you hear any one else make a demand for possession?

A. I did.

Q. Who was that?

A. Your brother and the United States Marshal.

Q. And was the demand refused?

A. Yes.

Q. What was done with this \$16,077.50?

A. Why, after the United States Marshal had taken the cars and they were in his possession three days, I was notified through my office in Portland—

MR. SMITH: Just a minute. That is objected to, if the Court please. Any conversation between him and the plaintiff, or any instructions that he gave after the action was brought is wholly immaterial.

COURT: I don't think it is material what became of the sixteen thousand.

MR. SMITH: As long as he didn't pay it to us, that is all there is to it.

COURT: As long as it didn't get to the defendants.

CROSS EXAMINATION

Questions by Mr. Hardy: You mean to say, Mr. Goden, that when the United States Marshal came to

Eugene with a writ of replevin, the defendants refused to let him take possession of the cars?

A. No, not the United States Marshal.

Q. And when the Marshal came there with a writ of replevin and demanded the cars, he got them, didn't he, on the writ of replevin?

A. He took possession of them after Mr. McDougal's brother asked you for them and you refused them. Then he introduced himself as the United States Marshal, and told you what he was going to do.

Q. That is after the action had been commenced, and the Marshal came to Eugene accompanied by Mr. McDougal's brother, was it not?

A. No. He simply came, and Mr. McDougal's brother entered first and asked you for the cars, and then you refused, and the Marshal stepped up and introduced himself as the United States Marshal and took possession of the cars.

Q. But Mr. McDougal didn't go to Eugene until after the action had been commenced, and he came with the Marshal. The Marshal had the writ of replevin in his possession at the time, didn't he?

A. Mr. McDougal and the Marshal didn't go to Eugene together. Mr. McDougal was in Eugene before the Marshal was there by a day.

Q. Don't you know it to be a fact that this writ of replevin was served on Monday morning?

A. I do not.

Q. Do you deny it?

A. I do not.

Q. Do you mean to claim that Mr. McDougal was

there on Sunday, the day before, and demanded possession of these cars?

A. I do not.

Q. Before the Monday. When do you claim Mr. McDougal ever demanded possession of these automobiles?

A. On Monday.

Q. The day the Marshal took the cars under the writ, wasn't it? I show you the original complaint; look at the date, when it was filed.

MR. SMITH: I ask the Court to take notice of the fact that the complaint was filed here on June 3d.

MR. McDOUGAL: It was Saturday, whatever it was.

Q. After this complaint was filed, and after the Marshal had the writ in his possession for a replevin in this case, was when Mr. McDougal was in Eugene, was it not?

A. He was there at that time.

Q. Why didn't you say so before?

A. I said he was there at that time.

Q. What do you claim as the selling price of these cars from the Ford Motor Company to Winchell and Hathaway? Tell the jury again the price.

A. I claim they are consigned to them on 85%, or \$374.00 plus the freight, and four dollars allowance for assembling.

Q. Who fixes the price of the automobiles?

A. The Ford Motor Company at Detroit.

Q. Both wholesale and retail?

A. Both wholesale and retail.

Q. Then you claim that the agent pays the same price for the car that the consumer pays, do you?

A. No, I do not.

Q. Are you familiar with these invoices?

A. I am.

A. Are not these the invoices of the cars in question, that I hand you now?

A. Invoices on the cars in question, yes.

Q. What does it mean when it says here "Ford Motor Company sold to Eugene Ford Auto Company 8 touring cars," giving the price?

A. According to their contract, consigned to them on this basis.

Q. Would the Ford Motor Car Company ever receive another dollar from Winchell and Hathaway, the agents, after they had paid these invoices?

A. They might.

Q. They might—how?

A. According to the contract, which advises the stipulations stated in there.

Q. Do you mean to testify that there was any further price to be paid the Ford Motor Company?

A. I do.

MR. McDOUGAL: I object to that. The contract speaks for itself.

MR. HARDY: He has undertaken to testify as to what the price is.

COURT: He can answer the question.

A. Yes, the paragraph I read to the jury provides in there, they shall pay ten per cent more if they want to get full bill of sale for the cars.

Q. As a matter of fact did they pay any more after these invoices were marked "Paid"?

A. Not that I know of.

Q. They didn't pay any more, did they?

A. I don't know.

Q. And they got a paid receipt in full, didn't they?

A. I don't know.

Q. Now, did you offer Winchell and Hathaway that Friday night in the hotel, cash?

A. Told them it was in the bank. I couldn't get in the bank then.

Q. Did you offer them a check for the money?

A. Told them I had the right to draw a check, yes.

Q. You simply told them the money was there and you could give a check the next morning, and I told you we would take it under advisement, didn't I, and you said the offer was withdrawn, didn't you?

A. I told you at the time, speaking to you at the time, as far as you were concerned, the offer was withdrawn. I was talking to Hardy.

Q. You knew I was representing Hathaway and Winchell?

A. Not the way you came. You didn't say so until you got to the room.

Q. They told you I was their attorney?

A. Not until we got in the room.

Q. And we three came into the room?

A. The fact is, I didn't know you were following me up, going into the room.

Q. You didn't put me out of the room?

A. No, I didn't.

Q. And you told us then and there the money was in the bank and you could give us a check the next morning?

A. Yes.

Q. That is as far as you went in making a tender, when you said that?

A. I said this—I want to correct you. I said “According to the contract the money was in the bank to pay them for the amount of money they had invested in these cars.”

Q. When I told you we would take the matter under advisement, didn’t you then and there say the offer is withdrawn?

A. I said “No advisement in this case as far as you are concerned.” The offer was withdrawn. That was you.

Q. As the three of us walked out of the room, didn’t you follow us out of the room, and repeat the offer was withdrawn, shaking your fist?

A. I have no recollection of that; I had no reason for shaking my fist.

Q. And didn’t you follow us way over to the elevator entrance—

A. No.

Q. (Continuing) and say the offer is withdrawn?

A. I did not.

Q. Now, Mr. Goden, didn’t you, that evening in the room, you and Mr. Vick being present, I and Mr. Winchell and Mr. Hathaway, tell us that you had been down to Portland, and that you had had a conversation with the officers here, the local officers here, of the Ford Motor Company, and that the company wouldn’t stand

for paying us back our contract deposit money? Didn't you tell us that and our bonus money?

MR. McDOUGAL: Object to that as incompetent, irrelevant and immaterial. There was nothing gone into on direct examination with reference to the bonus money.

COURT: You went into part of that conversation and certainly counsel has a right to all of it.

MR. McDOUGAL: And for the further reason that the question does not specify with whom the conversation was had in Portland.

COURT: He is asking about a statement supposed to have been made to these people in Eugene.

MR. SMITH: What he told us.

MR. McDOUGAL: Save an exception.

Q. Didn't you tell us that?

A. Repeat the question, please.

Q. Didn't you, at the time you have testified about, in the Osborne Hotel, on Friday night, Mr. Vick being present, in your room at the hotel, Mr. Winchell, the defendant, being present, Mr. Hathaway, the defendant, and myself, we all being present in the room, didn't you make a statement to us that you had had a conversation with the officials of the company here in Portland, that is Mr. Norman, the assistant manager, and that they would not consent to the payment back of the deposit money and of the bonus money?

A. I did.

Q. And then you said "All I can do for you boys is to give you back"—"get you what you paid for the cars."

A. I didn't say "get you"—I said "Give you back."

Q. "The money is in the bank"—didn't you?

A. Yes.

Q. "And I can give you a check for it tomorrow morning"?

A. Yes.

Q. And I said we would take it under advisement and you said the offer is withdrawn?

A. I said as far as you were concerned; you wasn't in it; you didn't have anything to do with it.

Q. Do you want to make it appear now, when you said the offer was withdrawn, it was only withdrawn on my account, and not with Winchell and Hathaway?

A. Absolutely. I didn't see where you came in at; I had no business with you.

Q. Did you in that conversation say the offer was withdrawn as to Winchell and Hathaway?

A. I did not.

Q. Why did you withdraw any offer to me? I wasn't getting any money from you. You hadn't offered me any money.

A. I didn't want to have anything to do with you. You wasn't in it.

Q. Why did you say the offer was withdrawn if you had nothing to do with me?

A. Because I didn't want you to understand that you had anything to do with it.

Q. Is that the only explanation you can give of saying the offer was withdrawn?

A. That is all, sir.

Q. How many times was McDougal's brother at Eugene, then afterwards?

A. Once.

Q. That was Monday, June 5th.

A. He came on Sunday.

Q. But he saw them on Monday, June 5th?

A. Yes, sir.

Q. After this action was commenced?

A. Sir?

Q. After this action was commenced?

A. He saw them, you say?

Q. Yes.

A. Yes.

Q. And after the action was commenced?

A. I don't know when the action was commenced.
I wasn't in Portland at the time.

Q. If the action was commenced on the third. Now, you have testified as to the value of these cars before this jury, and you have testified as to the retail value of the cars, haven't you?

A. The retail value?

Q. Yes, that is what I or any other man would pay.

A. I testified that is what they were consigned to the agents for.

Q. Now, I will show you the original complaint in this case, which is sworn to by Mr. McDougal, and I will ask you to look at the complaint in this case, and will ask you if this sum mentioned in the complaint is the same price which you have testified to, to the jury, as to the price of the cars.

A. It is the price that the cars were consigned to the agents for.

Q. It says here that is the full value.

A. Full value of the cars as far as the agent is concerned.

Q. You fix the selling price to the public, that is the Ford Motor Car Company does?

A. The Ford Motor Car Company does.

Q. And as far as the agent is concerned, the price and value of the cars is the amount that was sworn to in this complaint, is it not?

A. As far as the agent is concerned?

Q. Yes.

A. That is what they are consigned to the agents for.

Q. You insist on the word "consigned."

A. I only know my contract as a consigned contract, sir.

Q. Well, will you kindly read the sworn complaint in this case and notice that it says here that the value of the cars is \$16,077.50?

A. I see that in there.

Q. That is the price the agent paid for the cars, isn't it?

A. That is the price they were consigned to him for, sir.

Q. That is all he was ever to pay for them, isn't it?

A. I do not know. That would depend on the conditions.

RE-DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Goden, why were you down there conferring with Winchell and Hathaway concerning this \$16,077.50?

A. Because our contract provides that we shall pay them back their money for the automobiles they have on hand if we cancel their contract, and it was my instructions from my manager, Mr. Norman to do so.

Q. And you at no time, prior to the Monday that the Marshal took these automobiles, asked them for the automobiles in question?

A. No, I do—no.

Q. Made no demand upon them?

A. No.

Witness excused.

F. C. McDOUGAL, a witness called for the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. McDougal, when did you go down to Eugene, on Saturday or Sunday or Monday, with reference to this Winchell and Hathaway matter?

A. I believe I went down Saturday and stayed over Saturday and Sunday.

Q. Will you state whether or not you made any demand upon the defendants for the possession of a certain number of automobiles in their custody.

A. Just prior to the time that the United States Marshal and his deputy went in and took the cars, I made a demand upon Mr. Hathaway and Mr. Winchell, who were there in their garage, for the cars, asking them to give back all the cars; told them who I was and that I represented the Ford Motor Company.

Q. Was there anything said by you at that time with reference to tendering back the money?

A. There was something said in regard to the money due these men, Hathaway and Winchell, now being in the bank there at Eugene, and told them that they would get their money back, and that the money was waiting for them; either Mr. Goden or myself said that, but I don't know which one of them, but I am pretty sure I said it, though I am not positive.

CROSS EXAMINATION

Questions by Mr. Smith: Mr. McDougal, you were there only the once, weren't you?

A. I was there only once, just prior to the time the United States Marshal took the cars.

Q. That was on Monday?

A. Yes, Monday morning.

Q. So if the case was started here on Saturday, you never made any demand yourself before Monday, after the case was started?

A. No, I made the demand just prior to the time the United States Marshal took the cars.

Q. And you had the United States Marshal there to take possession of the cars if they didn't turn them over at once?

A. Yes, sir.

Q. So the suit must have been started, for the Marshal was there; had the papers, didn't he?

A. Yes, sir.

Q. Ready to grab them?

A. About five minutes before the—

Q. About this alleged tender, what is it you say was told them?

A. Either Mr. Goden or myself, but I believe I said it myself too, told Mr. Hathaway and Mr. Winchell, I think Mr. Hardy was there, and several others, that the money on these cars, which they had paid in would be given back to them. I don't know whether I said it or Mr. Goden; either one of us stated at the time.

Q. That is all you did. You didn't offer the money or offer a draft of any kind?

A. No, I made no other offer.

Q. On Saturday when the case started, they didn't deposit any such sum in court?

A. No, I think the money was laying down in the bank all the time.

Q. When did you first meet Mr. Hardy?

A. Monday morning.

Q. This morning of June 5th, 1916?

A. The day the cars were taken back. I don't know the exact date.

Q. You never met him before, until then, did you? That is, he was a stranger to you until that time, wasn't he?

A. I believe he was.

Witness excused.

WILLIAM S. McNAMARA, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. McNamara, you held what position with the plaintiff, the Ford Motor Car Company, during the months of May and June, 1916?

A. Chief clerk.

Q. And as chief clerk, what did your duties consist of with reference to the Eugene Ford Auto Company?

A. Well, I have charge of all the accounts and records of the Ford Motor Company.

MR. McDOUGAL: Did you introduce the records, the bills?

MR HARDY: No, these are to be offered by us as a part of our defense; you will have to take the drafts that go with them, if you take them.

Q. Do you recall Mr. Goden coming up to the office of the Ford Motor Company there, here in Portland, and making a report upon the Eugene Ford Auto Company?

A. I do.

Q. And what was said by Mr. Goden at that time?

MR. SMITH: That is objected to as incompetent, immaterial and irrelevant, if the Court please.

COURT: When was that? I think the objection is well taken.

Q. Mr. McNamara, did you go down to Eugene?

A. No, sir.

Q. Have you ever had any conversation at all with the defendants, Winchell and Hathaway, in this case?

A. No, sir, not in regard to this case.

Q. You know nothing about this particular case except as it has come through your hands as chief clerk over there?

A. That is all.

CROSS EXAMINATION

Questions by Mr. Hardy: You say you are the chief clerk that had charge of the Winchell and Hathaway matters?

A. Yes, sir.

Q. Can you identify then these invoices and drafts for these automobiles that were invoiced to them, and paid for by them? I will ask you if these were issued out of your office in payment of the automobiles in question, these being the invoices and drafts by which the Ford Motor Car Company received payment?

A. That is the form we used in connection with our business.

Q. And those are the accounts that you had charge of, of course, and you can identify them?

A. Yes, sir.

MR. HARDY: We will offer in evidence the invoices and drafts, showing payment for these automobiles.

MR. McDOUGAL: No objection.

MR. HARDY (reading): "Ford Motor Company, sold to Eugene Ford Auto Company, Eugene, Oregon, 8 touring cars, 56 tread, \$3520.00; less 15%, \$528.00; \$2992.00. Prop. freight Detroit to Portland, \$335.00—\$3327.54." "Ford Motor Company, sold to Eugene Ford Auto Company, 8 touring cars, 56" tread." "Ford

Motor Company, sold to Eugene Ford Auto Company, 8 touring cars, 56" tread." One of these is "Sold Eugene Ford Auto Company, Eugene, Oregon, May 25, 1916, assembly stock; date shipped May 25, 1916. Terms strictly net cash. One runabout 56" tread, \$390.00, less 15%, \$58.50, balance \$331.50. Retail freight Detroit to Portland, \$53.25; 10 gallons gas and 4 quarts oil, \$2.35. Total \$387.10." This last being a car that was driven up to Eugene, instead of going by freight, and paid for here.

A. That last car in Portland was delivered to a traveling man in Portland for their account, a man by the name of Matthews.

MR. McDOUGAL: Was not in this consignment at all.

A. Was not in the carload.

COURT: One of the cars in controversy; was delivered here to a traveling man in Portland on account of Eugene.

A. No, it was not one of the cars that was replevined.

COURT: I beg pardon; I thought it was.

MR. HARDY: It was simply offered in connection with the statement. This witness testified as to the course of dealing; this witness has testified that he knew about their account, and I offer this for the purpose of showing the course of dealing, and as a part of the cross examination in connection with the testimony of their witness.

COURT: I think it is competent for that purpose; I thought it was one of the cars in controversy.

MR. McDOUGAL: This is introduced to show custom?

MR. HARDY: Goes to show we bought and paid for the cars; that is all it is offered to show.

MR. McDOUGAL: We object to its introduction on this.

COURT: I think it is competent.

MR. SMITH: I will ask this witness some questions, with your Honor's permission.

Questions by Mr. Smith: Mr. McNamara, I will show you this invoice dated March 13, 1916, and the draft dated March 14, 1916; these two constitute the papers in one transaction, don't they; that is, that draft accompanied the invoice?

A. Accompanied the bill of lading.

Q. Well, that is the draft made on this invoice, then?

A. Well, I couldn't state as to that because it does not give the car number.

Q. How much is the draft for?

A. \$3327.54.

Q. How many cars in the invoice?

A. Eight.

COURT: You say the draft accompanied the bill of lading. The cars were shipped to these people, bill of lading with draft attached?

A. Yes, sir.

COURT: And you drew on them for the amount and sent it accompanied by bill of lading?

A. Yes, sir.

COURT: And before they got the cars, they had to pay that draft?

A. Yes, and invoice sent to them for checking record.

Q. This is the invoice that accompanied that draft as a checking measure?

A. Yes, sir.

MR. SMITH: I ask that the draft and invoice be marked as one exhibit.

Marked DEFENDANTS' EXHIBIT A.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.		
Charge same.	Order date Mar. 13, 1916.	
Terms strictly cash, Norman	Assg. stock	
	Date shipped Mar. 7, 1916.	
	Farmers and Merchants Bank,	
	Shipped via	
8 Touring cars, 56" tread		\$3520.00
Less 15%		528.00
		<hr/>
		\$2992.00
Prop. freight Detroit to Portland.....		335.54
		<hr/>
		\$3327.54

Motor Nos.

1067411

1067426

1067396

1067382

1068830

1067377

1068781

1067415

Dated at Portland, Oregon, Mar. 14, 1916.

\$3327.54

No. 1822

Ford

Ford

At sight, on arrival of goods, pay to the order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-seven and 54/100

Dollars (with exchange)

Value received and charge to the account of

S. P. 6686

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid May 24, 1916

Eugene, Oregon.

Q. Invoice dated April 4, 1916, and draft April 3, 1916, they relate to the same transaction?

A. I couldn't state fully unless I had my records here to tell.

Q. From looking at the records you have that is your best recollection of it, is it not?

A. I should think they were. I could tell positively if I had my draft book.

Q. The draft and invoice are in the same amount and made practically on the same date?

A. They are.

MR. SMITH: We offer this draft and invoice as one exhibit.

Marked DEFENDANTS' EXHIBIT B.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.		
Charge same.	Order date April 4, 1916.	
Terms strictly net cash.	Date shipped 4-23-16	
	Customers order	
	Contract	
	Shipped via S. P. in U. P. 175291	
8 Touring cars, 56" tread.....		\$3520.00
Less 15 %		528.00
		<hr/>
		\$2992.00
Prop. freight Detroit to Portland.....		333.54
		<hr/>
		\$3327.54

Mot. Nos.

1116510

1067484

1022282

1008770

1116461

1116486

1116479

1116459

Dated at Portland, Oregon, Apr. 3, 1916.

\$3327.54

No. 1894

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-seven and 54/100

Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid May 24, 1916

Eugene, Oregon.

Q. I will now show you invoice dated March 28, 1916, for \$3329.87, and draft dated March 29, 1916, for \$3329.87. They relate to the same transaction, do they?

A. Yes, sir.

Mr. Smith: We offer this draft and invoice as one exhibit.

Marked DEFENDANTS' EXHIBIT C.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.	Assg. stock	
Charge same.	Order date Mar. 28, 1916.	
Terms Norman	Date shipped Mar. 28, 1916.	
	First National Bank	
	Shipped via	
8 Touring cars, 56" tread.....		\$3520.00
Less 15%		528.00
		<hr/>
		\$2992.00
Prop. freight Detroit to Portland.....		337.87
		<hr/>
		\$3329.87

1115500

1115957

1115941

1115931 C. I. cover

1115943 "

1115933 "

1116008 "

1115791 "

Dated at Portland, Oregon, March 29, 1916.

\$3329.87

No. 1877

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-three hundred twenty-nine and 87/100

Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid May 24, 1916

Eugene, Oregon.

Invoice for runabout, May 25, 1916, \$387.10, marked

DEFENDANTS' EXHIBIT D.

Ford	Ford Motor Company	Invoice
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Portland, Ore.

Sold to Eugene Ford Auto Company

Eugene, Oregon.

Order date, May 25, 1916.

Charge same.

Assg. stock.

Terms strictly cash.

Date shipped May 25, 1916

Norman

Shipped via

Customers order

Paid

1 Runabout, 56" tread	\$390.00
-----------------------------	----------

Less 15%	58.50
----------------	-------

\$331.50

Retail freight Detroit to Portland.....	53.25
---	-------

10 gal. gas and 4 qts. oil. 2.35

\$387.10

1208507

Paid May 25, 1916
Ford Motor Company
Per Van H.

RE-DIRECT EXAMINATION

Questions by Mr. McDougal: How do you account for the fact that the invoices have the word "Sold"?

MR. SMITH: Just a moment. That is not ambiguous. The testimony is not admissible unless an ambiguous word. The word "sold" has a definite meaning.

Q. I will withdraw that and put it in this way: Will you explain if any reason why this particular form of invoice was used in this transaction.

MR. SMITH: Objected to as incompetent, irrelevant and immaterial. The transaction was cash; they paid cash before they took these automobiles out of the car, before they got them in their possession.

COURT: I think the witness may explain any statement that may be on that invoice; it is not a contract between anybody; it is simply a memorandum. He can explain it, if any mistake about it, I suppose.

A. It is simply a memorandum of shipment, and not to be construed as an invoice, because the cars were shipped on consignment, and at a time last spring when we were short of the regular form of automobile orders, as we call them, and had to use the invoices, parts invoices

for shipping sheets for agents, to give them the numbers to check their cars.

Q. In other words, you used this particular form because you were out of the other form which you customarily used in these transactions?

A. That is it.

RECROSS EXAMINATION

Questions by Mr. Hardy: Mr. McNamara, do you mean to say you didn't use this same form for the two years before? What are you going to say when I produce the forms used two years before?

A. I think you will find a great many of them different.

Q. Do you want to be understood before this jury, the reason you used this form was because you were out of the other form, and it is not the same identical form you used during the previous two years, while they were your agents?

A. They are not the form we are using now. I don't know about two years ago.

Q. Please return after lunch. I will have these here and show them to you.

Whereupon proceedings were adjourned until 2 p.m.

Tuesday, September 5, 1916, 2 p.m.

F. B. NORMAN, recalled by the plaintiff.

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Norman, I believe you have already testified that you are the man-

ager, or were the manager at this time, of the Ford Motor Company, here in Portland?

A. Yes, sir.

Q. Will you state what this \$16,077.50 that you sent down to Eugene to Mr. Goden was for.

MR. SMITH: Objected to as incompetent, irrelevant and immaterial, nothing to do with this case; they don't claim they ever tendered it to us except as testified here this morning. That is another matter. Not deposited in Court, and not kept good anyway.

MR. McDOUGAL: This is more for the purpose of getting at the value of the cars.

COURT: Very well; proceed.

A. Refund on cars that had been paid by the Eugene Ford Auto Company.

Q. What do you mean by refund?

A. The money that they had paid to the bank on the cars that they had taken over from the—that we had shipped to them.

Q. Now, it is pleaded in the complaint here that the plaintiff tendered into Court and have tendered into Court with the clerk, the sum of \$3401.12. Will you state to the jury how that amount was arrived at as a refund on these cars.

MR. SMITH: Just a moment, if the Court please. I want to correct that question, or statement of facts. That statement is not in the original complaint; the tender was not made with the original complaint; they have filed an amended complaint. If they will change that question, so it will show the amended complaint.

MR. McDOUGAL: Change that and put in the word "amended." So the question is correct.

Q. (Read as follows: Now, it is pleaded in the amended complaint here that the plaintiff tendered into Court and have tendered into Court with the clerk, the sum of \$3401.12. Will you state to the jury how that sum was arrived at as a refund on these cars.)

A. I am not familiar with those figures at this time.

Q. What does this \$3401.12 represent?

A. It represents the contract deposit and rebate they have coming on cars over a certain volume of business that they had on straight 15%; we pay a certain rebate, additional rebate, and that is the earned rebate.

Q. What became of this \$12,676.38 that was sent down to Eugene for the purpose of returning to the defendants in this case?

MR. SMITH: Objected to as incompetent, irrelevant and immaterial. Nothing to do with this case, inasmuch as it was not tendered in Court here, and was never paid the defendants.

COURT: I don't suppose it was necessary to tender into Court if they offered to repay to the defendants before they undertook to take possession.

MR. McDOUGAL: We want to show why we didn't tender this money into Court; it is proper to show at this time.

COURT: I don't suppose paying into Court would make any difference. If I understand that contract you were obliged to refund this money before you took possession of the cars. If you didn't do it, you were not entitled to possession of the cars and you couldn't vest

the title in yourself by a tender to the Court later.

Q. (Read)

A. That was paid to the bank on mortgage they had given for these cars.

MR. SMITH: We move to strike that out, if the Court please. There was no payment before this action was begun at all, and no payment to us, or for us, or with our authority, to anybody.

COURT: They will have to show it was done with the authority of the defendants, or paid to them before the action was commenced, as I understand it.

Q. For what purpose did you say this was paid to the bank, this money?

A. Money that they had advanced on these cars for the Eugene Ford Auto Company.

Q. Do you know whether or not it was impossible for the Ford Motor Company to get possession of these cars, as far as the bank was concerned, until this money had been paid to the bank?

MR. SMITH: Objected to; that calls for a conclusion of the witness. Let him state the facts if they will justify such a position, and the man knows.

COURT: I think the objection is well taken, and I don't see that it has anything to do with the merits of this particular case on trial now.

MR. SMITH: They took the cars under the writ. It is admitted here that the Deputy Marshal was down there and took the cars immediately after Mr. McDougal's brother made the alleged demand on that Monday morning.

CROSS EXAMINATION

Questions by Mr. Hardy: Mr. Norman, at the time this controversy arose, you were the manager of the Ford Motor Company at Portland?

A. Yes, sir.

Q. And as such had charge of their business in the state of Oregon?

A. Yes, sir.

Q. You are not the manager for them now?

A. Not at this particular place, no.

Q. Have nothing to do with their business in Oregon, any more?

A. No, sir.

Q. At what date do you claim you gave the First National Bank at Eugene the twelve thousand dollars?

A. Sixteen thousand, I think it was, the value of the cars. I don't remember the dates now; it was at the time, though, after the cancellation went into effect.

Q. You don't know the date?

A. I haven't it here, no.

Q. You don't know how much you gave the First National Bank, either, do you?

A. Well, I don't remember the figures.

Q. It was after this action was begun? You know that, don't you?

A. Not that I know of, no.

Q. Don't you know, as a matter of fact, that it was not only after the action was begun but after the answer was filed?

A. No, sir.

Q. You don't know that that statement is not true, though, do you?

A. There was no action begun at the time I authorized this money from the Lumbermens Bank to be sent to Eugene.

Q. No, I mean at the time you paid it to the bank. You say you paid some money to the First National Bank at Eugene. Don't you know, as a matter of fact, you didn't do that until after this action was commenced and after the answer was filed?

A. That is probably so. I wouldn't say.

Q. Can you say how big a business the Ford Motor Company did last year?

A. Not offhand, no.

Q. Isn't it a fact that the Ford Motor Car Company made and sold over a thousand cars a day?

A. I wouldn't say that, no.

MR. McDOUGAL: I object to that as improper cross examination.

MR. HARDY: I think that is part of our own case, anyhow.

MR. McDOUGAL: Here is that telegram you asked for.

Q. Is this the telegram you sent to Winchell and Hathaway before you sent the registered letter?

A. Yes, sir.

MR. HARDY: We offer it in evidence, if your Honor please.

MR. McDOUGAL: For what purpose is that offered in evidence? To show cancellation of the contract?

MR. HARDY: The purpose it is offered in evidence for is it tends to show your course of conduct towards us. Tends to show malice, too.

Marked DEFENDANTS' EXHIBIT E, and read as follows:

"Portland, Oregon, May 24, 1916.

Eugene Ford Auto Co.

Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Vick Brothers who will open a branch at Eugene.

FORD MOTOR COMPANY."

Witness excused.

W. S. McNAMARA, RECALL FOR FURTHER CROSS EXAMINATION

Questions by Mr. Hardy: You testified this morning that you had run out of your regular form of invoice and were using a different form. Examine these now, and see if you don't want to correct your testimony.

A. Well, we have a different form that we use.

Q. Well, do you want to make any correction whatever of your testimony? Is there anything different in these forms of invoice showing the sale, and cancelled draft, from those used in 1916?

A. No.

Q. Those were used in 1916. Do you want to claim you used any different form in 1914 and 1913, now?

A. No.

Q. Then you were all wrong when you said that was the reason this morning, weren't you?

A. We have a new form now.

Q. But you were wrong when you said this morning that you had run out—

A. That is—

Q. That is you were mistaken.

MR. HARDY: I would like to offer these as a part of the cross examination to show the identical form.

Marked DEFENDANTS' EXHIBIT F.

Ford	Ford Motor Company	Invoice
	Portland	
Sold to Eugene Ford Auto Company		
Eugene, Oregon.		
Charge same,	Order date June 2, 1915,	
Terms strictly cash	Shipped June 2, 1915.	
	Customers order	
	Contract	Shipped via
8 Model T Touring cars fully equipped 56"		
tread		\$3920.00
Less 15%		588.00
		<hr/>
		\$3332.00
Proportional freight Detroit to Portland.....		334.94
		<hr/>
		\$3666.94

681759

681799

682025

682050

682064

682065

682067

682072

Dated at Portland, Oregon, June 2, 1915.

\$3666.94

No. 1218

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank
Thirty-six hundred and sixty-six and 94/100
Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

Ford

Ford Motor Company

Invoice

Portland

Sold to Eugene Ford Auto Company

Eugene, Oregon.

Charge same,

Order date Sept. 9, 1915.

Terms strictly cash

Shipped Sept. 9, 1915.

Customers order

Contract

Shipped via

8 Touring cars 56" tread.....	\$3520.00
Less 15%	528.00

\$2992.00

Freight Detroit to Portland.....	363.68
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Speedometers	48.00
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\$3403.68

854469

850522

862641

862644

862651

862660

862711

862727

Dated at Portland, Oregon, Sept. 8, 1915.

\$3403.68

No. 1398

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-four hundred and three and 68/100 Dol-
lars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

Ford Ford Motor Company Invoice
 Portland

Sold to Eugene Ford Auto Company
 Eugene, Oregon.

Charge same Order date Mar. 20, 1915.

Terms strictly cash Date shipped Mar. 20, 1915.

Customers order

Contract Shipped via

7 Model T Touring cars \$3430.00

1 Model T Runabout 440.00

\$3870.00

Less 15% \$ 580.50

\$3289.50

Proportional freight Detroit to Portland 332.38

\$3621.88

Motor No.	Car No.
686592	604969
686560	604979
686524	604982
686608	604983
686547	604985
687279	604989
687978	604994
694367	622112

Dated at Portland, Oregon, Mar. 6, 1915.

\$3667.42 No. 933

Ford Ford

At sight, on the arrival of goods, pay to the
 order of

Ford Motor Company

(Bank) Lumbermens National Bank
 Thirty-six hundred sixty-seven and 42/100
 Dollars with exchange
 Value received and charge to the account of
 Ford Motor Company,
 R. Van Harriseen,
 Cashier.

To Eugene Ford Auto Co.,
 Eugene, Oregon.

C/o First National Bank.

First National Bank
 Paid
 Eugene, Oregon.

Ford	Ford Motor Company	Invoice
	Portland	

Sold to Eugene Ford Auto Company
 Eugene, Oregon.

Charge same. Order date May 12, 1915.

Terms strictly cash. Date shipped May 12, 1915.

Customers order

	Contract	Shipped via
7 Model T Touring cars equipped 56" tread . . .		\$3430.00
1 Model T Runabout equipped 56" tread		440.00

\$3870.00

Less 15% 580.50

\$3289.50

Proportional freight Detroit to Portland 331.58

\$3621.08

681514

681516

681533

681543

681610

681635

681795

681849

Dated at Portland, Oregon, May 12, 1915.

\$3621.08

No. 1175

Ford

Ford

At sight, on the arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-six hundred twenty-one and 08/100
Dollars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

Ford

Ford Motor Company
Portland

Invoice

Sold to Eugene Ford Auto Company

Eugene, Oregon.

Charge same.

Order date May 14, 1915.

Terms strictly cash.

Date shipped May 14, 1915.

Customers order

Contract

Shipped via

8 Model T Touring cars\$3920.00

Less 15% 588.00

\$3332.00

Proportional freight Detroit to Portland..... 334.75

\$3666.75

681666

681687

681691

681700

681724

681726

681734

681748

Dated at Portland, Oregon, May 11, 1915.

\$3666.75.

No. 1189

Ford

Ford

At sight, on arrival of goods, pay to the
order of

(Bank) Lumbermens National Bank

Thirty-six hundred sixty-six and 75/100 Dol-
lars with exchange

Value received and charge to the account of

Ford Motor Company,

R. Van Harriseen,

Cashier.

To Eugene Ford Auto Co.,

Eugene, Oregon.

C/o First National Bank.

First National Bank

Paid

Eugene, Oregon.

A. I might state that this new form I had reference to is all bound together and the agents' shipping sheet was made a part of the form, and we didn't have those. We were using the old form, and we ordered the others from the factory, and they told us to use what we had on hand until they were used up, before we used the new one.

Q. During all the time that the Ford Motor Car Company did business with Winchell and Hathaway, they used this same form, didn't they?

A. Yes, sir.

Q. And you were mistaken in saying that they had used another form?

A. I was mistaken; I looked up the information today.

REDIRECT EXAMINATION

Questions by Mr. McDougal: What is that book you have there?

A. Automobile orders.

Q. Are those the originals of the copies of those orders they have?

A. This is the original order.

Q. Are the original orders for these particular copies that they have introduced in evidence in that book? Are those original orders the same as the copies?

A. Supposed to be. Those are carbon copies of the originals.

Q. Do the original orders have on them the same wording as the copies?

A. No.

Q. Wherein are they different?

A. The original orders says "Ship to Eugene Ford Auto Company and charge same," and as I said this morning, this is a memorandum for the agent to check his numbers by.

COURT: What do you mean by original orders.

A. It is order to ship cars.

COURT: Order from the agent or dealer?

A. No, it is an order from the office.

COURT: Office?

A. An order from our office to the shipping department to ship cars.

COURT: Not from the dealer?

A. Not from the dealer.

MR. SMITH: If the Court please, that is not binding upon the defendants. It is their manner of handling the transaction themselves. We move to strike out upon that ground.

MR. McDOUGAL: That is all right. Just this one question.

Q. Would the agent ever come in touch with these original orders you have in the book?

A. He wouldn't unless he came in the office to check up. Came to check up their accounts.

Q. All the invoices which were sent out, which were purported copies of these house orders you have there were different, in that instead of having the word "Ship to" they should have the word "Sold to"?

A. Yes, sir. We just used the invoice for their information in giving the order; that is why we used that.

RECROSS EXAMINATION

Questions by Mr. Smith: Let me see one of those "Ship to" businesses you have in there. All right, take the one of March 14, 1916; draft March 14, 1916, invoice March 13.

A. March 14, 1916, March 14, Automobile Order No. C-1122.

Q. Now, I will ask you, right over here, read that—right from your book.

A. Is that the one.

Q. Yes, that is the one.

A. Let's see the number.

Q. This is the one, isn't it. Now, will you kindly read the entire document in evidence; start right here; first up here; that same little picture up there with the word "Ford."

A. Yes, "Universal Car. Automobile Order." This isn't the same.

Q. You read what is on there.

A. "Ship Eugene Ford Auto Company."

Q. Isn't it "Sold to" over there?

A. No, sir.

Q. What is it?

A. "Ship."

Q. That is the order you say you have among yourselves down there?

A. Yes, sir.

Q. That never goes out to customers at all?

A. No, sir.

Q. This is what goes out to the customer, where it says "Sold to."

A. That goes out, a memorandum for checking.

Q. With that memorandum for checking which you make, you make a draft which has to be paid before he gets possession of the cars?

A. That is the idea. A sight draft is attached to the bill of lading. Do you want the rest of this read?

A. No, that is the material part. Read it if you want to, if you want to make your record. As far as I am concerned, I don't care for it.

REDIRECT EXAMINATION

Questions by Mr. McDougal: Was there anything else that went to agents besides this invoice with the "Sold to" on it?

A. No.

Q. That was sent how, by mail?

A. That was mailed out, yes.

Q. And bill of lading and draft were attached, and also sent by mail?

A. Yes, in the event that shipment was made to sub-agent a copy was sent to the Limited Agent, and also to the sub-agent. If we shipped the cars, say to Junction City, why we would say shipped to agent at Junction City, whatever it was, charge Eugene Ford Auto Company, and would draw a draft on the agent at Junction City, and this memorandum invoice that we sent out, we would send to the Junction City Limited Agent so he could check his accrued bonus.

Witness excused.

PLAINTIFF RESTS

V. W. WINCHELL, a witness called on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Hardy: Mr. Winchell, you are one of the defendants in this case, a member of the firm of Winchell & Hathaway?

A. Yes, I am.

Q. Doing business as the Eugene Ford Auto Company?

A. Yes, sir.

Q. How long were you and your partner agents for the Ford Motor Car Company at Eugene?

A. We were going on our third year, on our third contract when we were notified by telegram.

Q. Talk up so the jury can hear you.

A. We were going on our third year, on our third contract with the Ford Motor Company up to the time of this discussion.

Q. Mr. Winchell, you received a telegram, did you, of which copy was offered in evidence?

A. Yes, sir.

Q. And the registered letter?

A. Yes, sir.

Q. State whether or not you know Mr. Goden?

A. I do.

Q. Who testified here.

A. Yes, sir.

Q. How long have you known him?

A. Why, I can't exactly say, but we had business dealings with the Ford Motor Company through Mr. Goden on and off during our whole experience with the Ford Motor Company, you might say.

Q. That he would call on you?

A. Yes, sir.

Q. Representing the Ford Motor Company?

A. Representing the Ford Motor Company, yes, sir.

Q. And you dealt with him as you would the company, did you?

A. Yes, sir.

Q. Mr. Winchell, you may state to the jury whether or not he came to Eugene about the time you received this registered letter.

A. Yes, following this telegram, Mr. Goden appeared in Eugene and called on us.

Q. Now, tell the jury what he said and what took

place between you and your partner and Mr. Goden with reference to these cars. What he proposed.

A. Following this telegram, I believe it was the following day, Mr. Goden called on us.

Q. Speak up so the jury can hear you.

A. The following day, following this telegram, Mr. Goden called on us and told us that he had received a letter from the Ford Motor Company telling him to come there and settle this matter, this difficulty that had arisen and use discretion. I remember his using that phrase, and he also spoke up that he thought that we—he wouldn't be a bit surprised if we did resent it, but it wasn't the best thing for us to do; that the Ford Motor Company were a very large concern, and that they would undoubtedly keep it in the courts for an unlimited length of time, and that he had a plan whereby, after our considering it, he thought it would be best for us to consider and accept; and his plan was that he told us that Mr. Vick would take all our stock, our merchandise, accessories, office fixtures and everything that we had in our place, on inventory price, at what we paid for it, and that he would get us our contract deposit money, of which we put \$800.00 with the Ford Motor Company. That is necessary in order to do business with the Ford Motor Company; have to put up this deposit. And also our bonus money that accrues through volume of business. He agreed to do all of this. We—after Mr. Hathaway and I considered the matter—told them, told Mr. Goden—this was the following morning, Mr. Vick, one of the Vick Brothers, Mr. Goden and ourselves met at our place of business, and the proposition was repeated, and we

told them that we decided we would accept the proposition on this understanding: That after we had taken stock with Vick Brothers and everything was satisfactory, that we had enough contracts with the Ford Motor Company; that we had all of that we wanted; that if they were ready to put down what they owed us, and they would give us what was coming to us, in cash on our counter, we would accept the proposition. And he told us all right, if that is all we wanted, he would go to Portland and get the cash. That took place, I believe—following Mr. Goden, we didn't see him for the next day or so, but when he did come back, he spoke as Mr. Hardy talked this morning.

Q. You remember the action was commenced Monday morning?

A. Yes, sir.

Q. The papers were served?

A. Yes, sir.

Q. And what date did Mr. Goden appear again, preceding that Monday?

A. I don't remember that Mr. Goden appeared again after that transaction.

Q. I believe it is said he met you Friday night. Do you recall that?

A. Yes, that is right.

Q. Tell the jury what took place at that time. Where and all about it.

A. Our attorney, Mr. Hardy, and Mr. Hathaway, my partner, and myself, met Mr. Goden and Mr. Vick by mutual consent at the Osborne Hotel. We were asked up to Mr. Goden's room, and the conversation, if I

remember correctly, opened in this way: I asked Mr. Goden if he had come back with the money; he told us he hadn't.

COURT: He had not?

A. No, sir. And that the obstacles, one or two that they had in the office, if that is all there was they would waive it, but they had found counts, and that they had sent Mr. Goden back with instructions to replevin the cars. At that time I didn't know exactly what replevin was. They replevined the cars.

Q. What did he say he would give you?

A. Mr. Goden asked us, through our attorney, Mr. Hardy if—he said—he asked him if he had—he offered us 85 per cent.

Q. Well did he offer that or ask if you would accept it?

A. He asked us if we would accept it if it was offered, and Mr. Hardy, our attorney, when asked him if—words to the effect, if I remember correctly, if they wanted us to relinquish our claim on our bonus money and our contract deposit money. Mr. Goden replied that all he had authority to do was to advance this 85 per cent of this retail value.

Q. What was then said?

A. Mr. Goden then asked us—I believe the next thing in the line of succession was that Mr. Goden asked us if we would accept this money if it were tendered, and our attorney, Mr. Hardy told him that we would take it under advisement. I distinctly remember Mr. Goden at that time saying that the offer was withdrawn then and there, and as Mr. Hardy repeated—Mr. Hardy

has told you before, Mr. Goden repeated again in the hallway, the offer was withdrawn.

Q. Did you see him any more after that with respect to this matter?

A. I believe the next time that we saw Mr. Goden was at the time that the cars were replevined by the United States marshal.

Q. Did Mr. Goden or any one else ever tender you either cash, check or draft, or anything else for this money?

A. No, sir.

Q. Or any money?

A. No, sir.

Q. And did he or any one else make any demand on you for the cars?

A. No, sir

Q. Now, did you meet Mr. McDougall the morning that the Marshal took the cars?

A. Yes, sir.

Q. Do you recall whether Mr. McDougall made any demand at that time, or whether the Marshal simply took the cars under the writ?

A. I don't remember Mr. McDougall ever making any demand for the cars any more than through this Marshal. They came in all together and we were merely introduced around and were told that the cars were replevined by the United States Marshal, and he proceeded to read his documents.

Q. Now, Mr. Winchell, state to the jury how much you had paid for each of these cars.

A. We paid for these cars last year \$390.00—I forget just what the figures are.

Q. You can look at the invoice and refresh your memory as to the exact amount paid.

A. \$390.00 less 15 per cent plus \$53.25 freight; that is the price at Detroit, less our commission plus the freight to Eugene.

Q. Now, was there any further sum for you to pay the Ford Motor Car Company for these cars?

A. No, sir.

Q. And you paid for them at the time they were delivered?

A. Yes, sir.

Q. Did you ever pay any other price to the Ford Motor Company than the price you paid upon delivery?

A. No, sir.

Q. You were the agents for the Ford Motor Car Company in 1913, handling their cars from 1913 to 1914?

A. That is 1913-'14.

Q. During that year did you ever send any other money back to the company than you paid when the cars were delivered?

A. No, sir.

Q. And you handled Ford cars from 1914-'15?

A. Yes.

Q. Did you ever send any money back to the Ford Motor Car Company other than the price you paid upon delivery?

A. No, sir. That is pertaining to cars; outside of parts now.

Q. Yes. From 1915 to 1916 did you ever pay any further price than the price they were invoiced to you at?

A. No, sir.

Q. And you received the cars?

A. Yes, sir.

Q. And sold them in the course of business?

A. Yes, sir.

Q. What was your profit per car during the season beginning August 1st, 1915, to August 1st, 1916?

A. Our profit was 15 per cent of the advertised price, at Detroit—advertised by the Ford Motor Car Company, plus a graduated bonus which was very necessary.

Q. You added to the price you paid the Ford Motor Car Company your profit, did you?

A. Yes, sir.

Q. And received that from the customer?

A. Yes, sir.

Q. And kept the money?

A. Yes, sir.

Q. And if you didn't sell the car you simply had the car on your hands?

A. Yes, sir.

Q. Did the Ford Motor Car Company take them back off you?

A. No, sir.

Q. There were thirty-six of these touring cars, were there?

A. Yes, sir.

Q. And one Sedan?

A. Yes, sir.

Q. What did you pay for the Sedan?

A. Have you the bill there?

Q. I will ask you if the Sedan is invoiced on this paper I now hand you?

A. Yes, there is a carload of six touring cars, 56-inch tread; one Sedan, 56-inch tread; \$925.00 for the Sedan, less 15 per cent.

Q. What was the net price to you of the Sedan?

A. \$786.00 at Detroit. Now, I can't remember what the freight was.

Q. Plus the freight?

A. Plus the freight, yes, \$786.25.

Q. This is the Sedan mentioned here that they took away from you in the replevin action?

A. Yes, sir.

Q. Dated, 1915?

A. Yes, sir.

Q. And you had had this on hand ever since and been unable to sell it, had you?

A. Yes, sir.

Q. What is the fact as to whether in the meantime the Ford Motor Car Company had reduced its retail price on the Sedan?

A. We still owned the Sedan.

Q. Afterwards they reduced the price on them to the public?

A. They reduced no price to us.

Q. Have they to the public?

A. Yes, they have.

Q. But you were stuck for the same old price?

A. Yes, sir.

Q. And had the car on your hands at the time they took it away from you?

A. Yes, sir.

MR. HARDY: I will offer this sheet in evidence, showing the Sedan which is in evidence in this case.

Marked DEFENDANTS' EXHIBIT G and read as follows:

Ford Motor Company, Portland Branch, 8/27/15.
Sold to Eugene Ford Auto Company,
Eugene, Oregon.

Factory stock.

Date shipped, 8/27/15.

First National Bank.

Terms, net cash.

6 Touring cars, 56-inch tread.....	\$2640.00
1 Sedan, 56-inch tread.....	925.00

\$3565.00

Less 15 per cent.....	534.75
-----------------------	--------

\$3030.25

Proportional freight Detroit to Portland....	300.17
--	--------

Speedometers	42.00
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658934 Sedan

257276

858647

858893

859655

859662

859665

Q. That was paid for, was it?

A. Yes, sir.

Q. Now, Mr. Winchell, the pleadings show you had thirty-six touring cars on hand, and one Sedan, at the time the United States Marshal took the cars under writ of replevin?

A. Yes, sir, that is the Sedan that is mentioned there.

Q. Now, you have paid for these cars, it is admitted, a total of \$16,077.50. Is that right?

A. Yes, sir.

Q. Was there any further sum remaining to be paid for these cars?

A. No, sir.

Q. Nothing whatever in any way, shape or form?

A. No, sir.

Q. Now, can you tell the jury the number of cars that you had sold from August 1st, 1915, up to the time this action was commenced,—that you had purchased rather from the Ford Motor Car Company?

A. Why, Mr. Hathaway made a report of that.

Q. I have a memorandum in my hand which says 179 cars. Can you state whether or not that is correct?

A. Yes, sir.

Q. You know that is correct, do you?

A. That is taken from our books, yes, sir.

Q. That includes the thirty-six touring cars and the Sedan?

A. Yes, sir.

Q. Now, as I understand it, the price at which you sold these cars was \$493.25?

A. \$493.25.

Q. For each of the touring cars?

A. Yes, sir.

A. At what price could you sell these cars?

A. \$493.25.

Q. And you were carrying on your business in the usual course, were you?

A. Yes, sir.

Q. At the time the cars were taken?

A. Yes, sir.

Q. And you had prospects?

A. Yes, sir.

Q. Selling cars right along?

A. Yes, sir.

Q. State to the jury what the fact is as to whether or not in the ordinary course of your business, from the time these cars were taken up to the first of August you could have sold these thirty-six touring cars at that price to the public.

A. Well, the best way that I can state that to the jury would be that at the time we were interfered with by the Ford Motor Car Company, it took away from us the two best months of the year, two best selling months, the height of the automobile selling season, June and July. Our contract ran from August to August. Another thing to substantiate that fact is the amount of business that Vick Brothers did at that same station from the time we were practically thrown out. They sold—

MR. McDOUGAL: If the Court please, I object to any testimony as to what Vick Brothers did.

Q. State whether or not you could have sold the cars in the ordinary course of business at that time.

A. We certainly could, yes, sir.

Q. And as I understand it, the selling price of the Sedan was \$983.25. Is that right?

A. I think so.

Q. That is, I mean you would sell it to the public?

A. Yes, sir.

Q. Now, if including these cars you purchased 179 cars, as a mathematical proposition you had sold during the year 179, less 37. Is that right?

A. Yes.

Q. Or 142 cars that you had sold during the year.

A. That is in our territory.

Q. Now, who fixes the selling price of these cars?

A. The Ford Motor Company.

Q. The plaintiff in this case?

A. Yes, sir.

Q. And they dictate to you the price at which you should sell the cars?

A. Yes, sir.

Q. And they fix the value then, at Eugene, of \$493.25 for a touring car?

A. Yes, sir.

Q. And \$983.25 for a Sedan?

A. Yes, sir.

Q. And you were supposed to be content with that profit?

A. Yes, sir.

Q. Now, since the company took the cars, have you been out of business?

A. Yes, sir.

Q. Just been waiting there at Eugene until this matter was disposed of?

A. Yes, sir.

Q. Were you able to engage in any other business during this interim?

A. Lack of funds. Our money is tied up.

Q. You have never received a dollar from the Ford Motor Car Company, have you?

A. No, sir.

Q. They have never put the money in front of you where you could get it?

A. No, sir.

Q. If you wanted it, now, what kind of business—tell the jury what kind of business you were doing there. What was your average profit, outside of the price of the cars, running the garage and selling parts and gasoline and oil?

A. Well, the profit varies, but I should think—

Q. What would it average?

A. (Continuing) that a fair average of our profit would be a third—30% on the garage business. The cars are 15%, but we were enjoying a very nice business. Naturally our being the Ford agents there we corral practically the most of the Ford business.

Q. What did it amount to a month, on the garage business?

A. Oh, I haven't—

Q. Just approximately.

A. Approximately \$300.00.

Q. \$300.00 a month?

A. Yes, sir.

Q. That was selling what?

A. That is the parts and accessories, gas and oil, and stuff of that kind.

Q. That wasn't involved in the Ford contract at all?

A. No, sir.

Q. And how many automobiles were you to take from the first of August, 1915, to the first of August, 1916?

A. 286.

Q. And you would have had your profit on each of those cars?

A. Yes, sir.

Q. That would be 15% on every car?

A. Yes, sir.

Q. How many did you sell from the first of August, 1914, to the first of August, 1915? Would 161 be about right?

A. I think that was the amount, yes, sir. Mr. Hathaway took that off the books.

Q. I have a memorandum here from the first of August, 1913, to the first of August, 1914, 88 cars.

A. Yes, sir.

Q. What is the fact as to whether or not the business was increasing in that proportion? About doubling each year?

A. Yes, sir.

Q. Now, one of the witnesses has testified that after this case was commenced, and after the cars were taken, somebody has gone into the First National Bank of

Eugene and paid some debt of yours there. Did you ever authorize any one to do that?

A. No, sir, I didn't know of that being done.

Q. Was it done with even your knowledge?

A. No, sir.

Q. Long after the action was commenced and your answer filed?

A. Yes, sir.

Q. In this case. Now, have you ever received the five per cent additional bonus on the 179 cars?

A. No, sir.

Q. I believe you testified that Mr. Goden agreed that they would give you that?

A. Yes, sir.

Q. So that as a total you would be entitled to 20% on 179 cars, 15% plus 5% bonus?

A. Yes, sir.

Q. And you have never received the \$800.00 of your money that the company has?

A. No, sir.

Q. Tell the jury what kind of a building you had in Eugene, where it was located, the size of it.

A. Our building was—our floor space was, I think, 50 feet wide by about—oh, I don't know the depth—95 or 100 feet deep, three blocks from the main street there; it was a concrete building.

Q. Now, I wish you would tell the jury whether or not your business was decreasing or increasing.

A. Our business had been on the increase ever since we had taken hold of it.

Q. And all your capital is invested in these cars, and you haven't received it. Is that correct?

A. Yes, sir.

Q. Now, when the Ford Motor Car Company took possession of these cars under the writ of replevin, that was after you had agreed to, or had a tentative agreement to sell out the other business to Vick Brothers?

A. Yes, sir.

Q. When the Ford Motor Car Company took all these cars that you had bought and paid for, who since then has had possession of the gasoline and garage business?

A. Vick Brothers of Salem.

Q. The whole business has been taken away from you?

A. Yes, sir.

Q. And you have been turned out of the building itself, have you?

A. Yes, sir.

Q. Now, in your answer you claim the value of these cars, these thirty-six touring cars to be at \$493.25 each.

A. Yes, sir.

Q. And the Sedan at \$983.25?

A. Yes, sir.

Q. And none of that money you have received at all?

A. No, sir.

Q. And in addition to that there is your \$800.00?

A. Bonus money.

Q. No, deposit money.

A. Contract deposit money.

Q. And the 5% bonus on the amount of thirty-six touring cars at \$493.25, and the Sedan at \$983.25?

A. Yes, less a partial payment probably six months ago, some time ago, on this bonus money.

Q. That is six months ago you received some bonus money?

A. Yes, sir.

Q. And when you and Mr. Goden figured up the bonus money that he said he would get you, what did you figure it up at, at that time?

A. I can't give the exact amount.

Q. You can get that, can you? You have a memorandum?

A. Yes, we have a memorandum.

Q. All right, I wont ask at the present time. And in addition to that is your \$800.00?

A. Yes, sir.

Q. Besides the money you paid for the cars?

A. Yes, sir.

CROSS EXAMINATION

Questions by Mr. McDougal: Mr. Winchell, what territory did you have down there, with headquarters at Eugene?

A. Lane County with the exception of a little strip over on the coast.

Q. And you were to sell how many cars, or rather you did sell how many cars up to the time of the instituting of this action, in that territory?

A. I believe our record shows 174 there, isn't it?

Q. And you received 15% of the list price on the sale of all of those cars?

A. Yes, sir.

Q. Were any of those 174 cars or 142 cars—I think you have testified—were any of those cars sold by sub-agents under you?

A. Yes, there is a certain amount of these cars that went through our sub-agents.

Q. How many sub-agents did you have under your agency?

A. One, two, three, four—three.

Q. Which is it?

A. Three.

Q. How many of these 142 cars did these sub-dealers sell?

A. I can't tell you that.

Q. Can you estimate it?

A. Not without referring to our records.

Q. Well, will you look it up later on and find out, so you can tell me?

A. Yes, sir.

Q. Would you get straight 15% commission on these cars that were sold by your sub-agents?

A. We got the bonus money.

Q. Well, would you? Just answer the question; then you can explain it. Yes or no?

A. Will you put your question again, please?

Q. (Read as follows:) Would you get straight 15% commission on these cars that were sold by your sub-agents?

A. No.

Q. Now, you said something about bonus. What do you mean by that?

A. That is a profit that we get on volume of business. A graduated commission that we get on volume of business. From one to ten thousand, I believe was one per cent. From ten to twenty, two per cent. Our business exceeded fifty thousand dollars. We were in the five per cent class. We were entitled to five per cent bonus—five per cent extra profit.

MR. HARDY: You mean that a year, don't you?

A. Yes, during the year; during our contract.

Q. Had you arrived at the stage of receiving a five per cent bonus down there at Eugene at the time this action was brought?

A. Yes, sir.

Q. You had sold enough cars and the volume of business was great enough to entitle you to this five per cent additional bonus?

A. Yes, sir.

Q. What per cent if any of this bonus would your sub-agents get?

A. They got a graduated bonus as well as we did.

Q. Would that cut down your five per cent?

A. If they had reached the minimum amount it would, yes.

Q. Do you recall whether any of your sub-agents had reached that amount?

A. Yes, Mr. Goden, and ourselves figured with Mr. Vick; figured on this bonus money, and figured the amount of money that some of the agents would get—that they hadn't received, but we conceded that they probably would receive so much money before the year was out, and we figured that, the three of us, when this arrangement was made with Mr. Goden.

COURT: What was the amount of bonus that you figured would come to you?

A. If I remember correctly we figured our gross business for the year, up to the date, something about—over fifty-six thousand dollars.

COURT: How much was the bonus that would come to you?

A. That would be—

COURT: No, you said part of it went to sub-agents.

A. Well, that isn't clear in my mind. There was one of them—I believe we figured that Junction City would receive—would be in the hundred-dollar class.

MR. HARDY: We can show that by Mr. Hathaway, your Honor; he was more the bookkeeper of the firm.

A. Mr. Hathaway was the bookkeeper and had that all.

Q. I will wait then until Mr. Hathaway is on the stand. Now, Mr. Winchell, how long did you say you had been agents for the Ford Motor Car Company?

A. We were on our third year for the Ford Motor Company.

Q. And your garage was down there in Eugene?

A. Yes, sir.

Q. You had an established business?

A. Yes, sir.

Q. Did you own your garage?

A. No, sir.

Q. Or did you lease it?

A. What do you mean, own the building?

Q. Yes.

A. No, we didn't own the building.

Q. Did you lease it?

A. Yes, sir.

Q. Did you have a written lease?

A. No, sir.

Q. Month to month?

A. Yes, sir.

Q. How much rent did you pay?

A. \$55.00 a month.

Q. When Mr. Goden came down the first time to see you right after the telegram was received—or was the telegram received about the time the registered letter was received?

A. No, we received the telegram first and then Mr. Goden appeared on the scene.

Q. He appeared after the telegram?

A. Yes, sir.

Q. What was the subject of his conversation at that time?

A. The subject of the conversation was that Mr. Goden had been instructed by the management at Portland to come there and fix the matter up; he says "You no doubt know what it is." I told him yes, we had received this telegram. Well, he says, "What are you going to do about it?" and we said "You might figure the contract is cancelled. We don't figure it is. We are satisfied. We are doing a good business." Mr. Goden said that he expected that we would take that attitude, but that he thought it was a great deal better to settle the thing his way. That he had a letter to come down there and settle it, use discretion, and that after

our hearing what he had to say, or words to that effect, that we would probably think different about it. That we could go to court if we liked, but the Ford Motor Company was a very large concern and they would probably take it to a higher court and keep it in the courts indefinitely, and then he told us what he proposed to do, and went on as I have related before; that Vick Brothers stood ready to come in and take all our stock and accessories, fixtures, everything, dollar for dollar for what we paid for them, and that the Ford Motor Company would give us our contract deposit money and our bonus money, every cent that was coming to us, which we accepted, the following day, with the condition that they were to give us this cash as I spoke of before; and Mr. Goden went to Portland, and when he came back, and I asked him if he had the cash, he told us no, that he had come down there with instructions from Portland to replevin the cars.

Q. Mr. Winchell, you said, I believe, on your direct examination, that you expected the contract to be cancelled. Why did you say that?

A. Because we had a telegram to the effect that the contract was cancelled.

Q. I know, but you said you had expected a telegram cancelling the contract. Why was that?

A. I didn't make such a statement. If I did, I was mistaken.

MR. SMITH: After he got the telegram. The remark was to Goden, when Goden came down there.

Q. Mr. Winchell, what was the price at which you were to sell these cars?

A. \$493.25.

Q. And in that way you would get a commission of 15%.

A. Fifteen per cent of factory price; \$493.00, less freight.

Q. Did you sell each one of these cars at \$493.00?

A. Yes, sir.

Q. You are absolutely sure of that?

A. Why, no, we didn't altogether.

Q. What cars did you not sell for \$493.25?

A. I am not prepared to say.

Q. Can you estimate how many you sold at less than \$493.00?

A. No, sir.

Q. Can you give me the names of any persons or companies to whom you sold cars at less than \$493.25?

A. I cannot.

Q. By selling the cars at less than \$493.25, of course you reduced your commission that much, didn't you?

A. We did business on that much less profit.

Q. And you are unable at this time to tell me how much, or how many cars at less than that price, and how much your profit was decreased on that account?

A. I am unprepared to give you that at this time.

Q. Can you tell by an examination of your books?

A. No, sir.

Q. You have no records to show that?

A. No, sir.

Q. Would you say that you sold twenty-five cars at less than \$493.25?

A. No, sir.

Q. Twenty?

A. No, sir.

Q. Fifteen?

A. No, sir.

Q. Ten?

A. No, sir.

Q. How many?

A. I can't say.

Q. When Mr. Goden came down there to see you with reference to the cancellation and settlement of this contract prior to the institution of the action, you say he returned to Portland, to report on the negotiations?

A. I presume he did. He told us he was going to Portland to get the money, yes, sir.

Q. Then he came back on the next — what day would that be—the next day?

A. I believe it was Monday.

Q. On the next Monday?

A. Yes, sir.

Q. And that was the time that the cars were replevined?

A. Yes, that following morning.

Q. Now, are you and Mr. Hathaway the owners of this garage at the present time?

A. Yes, sir.

Q. Didn't you sell the garage to Vick Brothers and receive a thousand dollars deposit on the sale?

A. We sold the garage to Vick Brothers with the understanding that we were to get our bonus money and our contract deposit money from the Ford Motor

Company, of which Vick Brothers have a receipt to that effect—subject to receipt of all contract deposit money and bonus money from the Ford Motor Company.

Q. Have you that receipt with you?

A. We haven't the receipt. Mr. Vick is in possession of that receipt.

Q. You haven't a copy of it?

A. No, sir.

Q. Now, Mr. Winchell, what was the consideration for the sale of this garage?

MR. SMITH: Objected to; not competent in this case; the deal between them and Vick Brothers was conditioned upon the closing of the deal between the Ford Company and them, and the deal between Ford Company and them was never closed, so it is immaterial, more than anything else.

MR. McDOUGAL: If the Court please, this man claims he was damaged and his business ruined.

COURT: I think you have a right to inquire whether he sold the garage, and if so what he got for it.

Q. (Read) Mr. Winchell, what was the consideration for the sale of this garage?

A. You mean by that, the amount?

Q. Yes, what did you get for it?

A. Why, it was—I will have to refer to our records. It was in the neighborhood of two thousand for the part Vick Brothers were to take, wasn't it—eighteen hundred and something, if I remember correctly.

Q. Well, but if I understand it, Mr. Winchell, didn't Vick Brothers—you took an inventory of the stock, didn't you?

A. Yes, of the stock we had on hand at that time.

Q. Stuff you had on hand?

A. Outside of the cars.

Q. Then you turned it over to Vick Brothers dollar for dollar for what it cost you?

A. Yes, sir.

Q. That is all you did get?

A. Yes, sir.

Q. And you want the jury to understand that you were selling out a business that was paying you fellows net \$300.00 a month, dollar for dollar?

A. We got nothing for our business; we merely sold the stock and fixtures, merchandise we had on hand, accessories and stuff of that kind.

Q. What were you going to do with your business? You say you got nothing for the business.

A. I don't quite understand.

Q. You say you got nothing for the business. Did you give them the business in addition to the stock that they took over?

A. Yes, with a view of going into something else.

Q. You just threw that in with the stock?

A. Yes, sir.

Q. Now, at the time you entered into this contract with the Ford Motory Company, you recall reading it over, do you—knowing the contents of it?

A. No, sir, I had faith enough in Henry Ford at that time to sign it without reading it.

Q. You signed the contract without reading it?

A. Yes, sir, didn't understand it.

Q. You signed a contract for three years and didn't read it?

A. No, sir, never read it very—clear through until we got into difficulties.

Q. Here is paragraph 48: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect." Didn't you know that clause was in there?

A. I have read the contract at different times, different places. I don't remember. I have since we have gotten into legal difficulties. I have read the contract clear through.

Q. Did you sell any other cars down there than the Ford cars?

A. Yes, sir.

Q. What kind of cars did you sell?

A. Dodge cars.

Q. Were you selling the Dodge cars at the time this action was instituted?

A. No, sir.

Q. How long prior to that had you ceased selling Dodge cars?

A. The expiration of our last contract.

Q. When was that?

A. I can't say; several months.

Q. Several months?

A. Several months ago.

Q. You were simply handling the Ford Company's automobiles—selling Ford automobiles for the company and taking care of the service of the Ford Company?

A. Yes, sir.

Q. And the contract, you understood, according to paragraph 48, could have been cancelled at any time. You knew that?

A. No, I didn't at that time.

Q. Now, you say that you had never paid any further sum on the cars than 85 per cent of the list price, that you customarily paid when the cars were consigned to you. Is that right?

A. Yes, sir.

Q. Do you know whether or not under your contract you might not pay a 10 per cent additional in the event that you cancelled, or sold and obtained title to these cars?

A. Did I want?

Q. Read.

A. I didn't know that, no.

Q. This suit was instituted about the 5th of June, was it not—third of June? Have you and your partner, Mr. Hathaway, made any attempt or endeavor to run a garage down there at Eugene?

A. Not at Eugene; we have made attempts to secure other agencies in which we have been hampered by the want of money.

Q. Because of the fact that this money is tied up in this suit?

A. Yes, sir.

Q. How much actual money did you have tied up in these cars, of your own?

A. I can't answer that question. I don't know. I will have to refer to it.

Q. Well, did you pay for these thirty-seven cars in cash, out of your own funds?

MR. SMITH: That is wholly immaterial, if the court please, in the first place, and in the second place, if borrowed from the bank, it was their own funds; whatever they borrowed from the bank was their own money; the bank owned the notes and they owned the money.

COURT: Competent on the question of damages.

Q. Read.

A. I hardly know how to answer that question.

Q. Well, as a matter of fact, Mr. Winchell, haven't you and your partner been doing business on a shoe-string down there as a company—on credit?

A. I don't exactly understand you.

Q. Haven't you been borrowing money regularly to pay for these cars instead of using your own money?

A. We have used all of our own money and have borrowed money, yes. We have had a good credit.

Q. Well, in the last three years, or since December, 1913, haven't you borrowed an average of about five or six thousand dollars every three months?

A. I should think so, yes, or more.

Q. And this amount went towards payment for those cars?

A. Yes, sir.

Q. And you paid interest on this money at the rate of about eight per cent?

A. Yes, sir.

Q. That would necessarily go to the reducing of your profits, wouldn't it?

A. We always treated that as part of our overhead expense.

Q. Did you take that into consideration when figuring this \$300.00 net that you claimed this business was bringing in to you, a month?

A. I don't quite understand you.

Q. You have testified and sworn in your complaint that your business was bringing in a net profit of \$300.00 a month.

A. Approximately.

Q. Approximately. Did you take into consideration the expense of paying interest on these loans in figuring that, or did you leave that out?

A. That wasn't the part of the business that incurred it.

Q. Beg pardon?

A. That wasn't the part of the business that incurred the interest expense. It was the carrying of the automobiles that caused us to borrow money.

Q. Now, Mr. Winchell, were you there when this inventory was taken with Mr. Vick and with Mr. Goden?

A. I was there, yes, sir.

Q. Do you recall whether you checked out short of a great number of parts, or not?

A. I had nothing to do with taking the stock. Mr. Hathaway and Mr. Vick took the stock.

Q. Well, do you recall whether you were short any parts?

A. Short in what way?

Q. Well, say there would be extras on the cars missing, for instance, the head-lights? Do you remember about two dozen head-lights being short on the cars?

A. I remember, yes, a few head-lights and a fender or two we had taken from the cars before they had been assembled, to accommodate a customer; we had sold them those.

Q. And of course the cars would have been depreciated that much in value, would they not?

A. To that extent until it had been replaced. (To jury). You understand what he asked? We got those cars shipped to us all knocked down, and if a customer would come in and want a head-light, if we didn't happen to have head-lights in stock in the parts room, this parts or lights he speaks of happened to be out, before they were assembled, rather than have a customer go away dissatisfied we would give him one of these lights. It didn't make any difference whether in the stock room or in the back room. They were all our property, and we sold them a light.

Q. Referring again, Mr. Winchell, to these cars which you say you sold for less than \$493.25, didn't you sign a contract here providing you would sell these cars for \$493.25?

MR. HARDY: I object to that; the contract is the best evidence of its contents.

COURT: I suppose the contract speaks for itself.

MR. HARDY: He signed the contract; that is admitted.

Q. Now, Mr. Winchell, with reference to Mr. Goden's visit down to Eugene, he asked you to come over to the bank and get the money on these cars, didn't he?

A. I don't remember Mr. Goden asking me to come over to the bank.

Q. What did he say?

A. Mr. Goden said that he was prepared to come down and replevin these cars, or would we, if he offered us a check for the amount of these cars at Detroit less 15 per cent, would we accept it, and our attorney replied that we would take it under advisement, at which time Mr. Goden told him that the offer was withdrawn.

Q. Previous to that time had Mr. Goden offered to take you to the bank and get you this money?

A. No, sir.

Q. Your intention was not to take this money in any event unless the matter of the bonus was settled up, and the other matters, was it not?

A. That was the idea, yes, sir.

Q. So that if Mr. Goden had not settled up the bonus matter and the other claims that you had, the deposit money and claims of that nature, if he had offered you the money you would not have taken it, would you?

MR. SMITH: Objected to as incompetent, ir-

relevant and immaterial. Nothing to do with this case at present as it stands now.

COURT: I think the objection is well taken.

RE-DIRECT EXAMINATION

Questions by Mr. Hardy: Did they tell you that the reason they had cancelled the contract was because you had sold one or two cars for less than \$493.25?

A. No, sir.

Q. Did they intimate that was the reason they were taking the cars away from you?

A. No, sir.

Q. Mr. Winchell, it has been intimated or suggested that you sold the garage business to Vick Brothers. Was that deal completed when these cars were taken—with Vick Brothers. Did you ever get your money from Vick Brothers? Did they ever pay you up?

A. No, sir.

Q. What is the fact as to whether that was made part of the sale to the Ford Motor Car Company?

A. I understand it as such.

Q. That is on the Goden deal?

A. Yes.

Q. That they backed out of afterwards?

A. Yes, sir.

Q. And you have a case pending in Lane County that Vick Brothers brought?

A. Yes, sir.

Q. And that is not disposed of or settled?

A. No, sir.

Q. You were asked if you didn't have the agency for the Dodge cars. What is the fact as to whether or not the Ford Motor Car Company forced you to give up the Dodge agency?

A. That was the reason we gave up the Dodge line, because the Ford Motor Car Company compelled us to do so.

Q. And after that you still went ahead on the Ford.

A. Yes, sir.

Q. For how long, before they took the cars away?

A. Pretty near a year, I guess.

RE-CROSS EXAMINATION

Questions by Mr. McDougall: When this Dodge contract was given up by you, wasn't it understood that you were to get a bonus on the Dodge cars sold down there?

MR. HARDY: What has that to do with this case?

MR. McDOUGALL: That goes to the question of damages.

MR. HARDY: All right, go ahead.

A. What is the question, please?

Q. When this Dodge contract was given up by you, wasn't it agreed between you and the Dodge Com-

pany you were to get a bonus out of the cars sold during the time of your contract?

A. Not with Dodge Brothers, no, sir.

Q. Well, the other agent? Did you get it from the other agent who took the contract with the Dodge Company over?

A. Yes, sir.

Q. Was that \$25.00 a car?

A. Yes, sir.

Witness excused.

F. M. Hathaway, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Hardy: Are you the other member of the firm of Winchell & Hathaway?

A. Yes, sir.

Q. Mr. Hathaway, Mr. Winchell looked out for the outside business in the sale of the cars, and you ran the office?

A. Well, we pulled together pretty well on that. I took more part in taking care of the office.

Q. Now, tell the jury what amount of this bonus money had been figured was due you at the time the cars were taken.

A. Between eighteen and nineteen hundred dollars, was the amount.

Q. Not less than eighteen hundred?

A. Yes, sir.

Q. And in addition to that the eight hundred that they had of your money?

A. The deposit money was still remaining due.

Q. Tell the jury the number of cars and the amount that you were to be paid for the cars.

A. There was thirty-six touring cars and one Sedan, and we were to be paid 85 per cent of the list price at Detroit.

Q. Well, you have it on your card there, the amount that you had paid for each of these cars?

A. We paid in the neighborhood of \$374.00 for the touring cars, \$331.50 for the runabout, and \$786.25 for the Sedan. Then there was the additional \$53.25 that we paid, freight from Detroit to Eugene. Also an additional five dollars extra on the Sedan; it cost a little more.

Q. What was the total you had paid for the cars?

A. I couldn't say the exact amount, but around sixteen thousand—

Q. \$16,077.50?

A. Yes, sir.

Q. The amount you had actually paid for the cars?

A. Yes, sir.

Q. State to the jury whether or not there was any further sum to be paid by you?

A. No, sir.

Q. Then when you sold the cars you got your profit?

A. Yes, sir.

Q. And if you didn't sell them you didn't get the profit. Is that right?

A. They remained ours.

Q. Were you in Eugene at the time this telegram was received that is in evidence?

A. Yes, sir.

Q. Did you see Mr. Goden when he came to Eugene at that time?

A. Yes, sir.

Q. Now, you tell the jury what Mr. Goden said to you and Winchell when he came at the time of the telegram.

A. If I remember correctly, Mr. Goden came in on Wednesday and he said he didn't know exactly what was up, but he had been ordered by the Ford Motor Company to come to Eugene. He was down in Southern Oregon, and he said though that he did know they was counting on cancelling our contract, but he was going to wait until he got further particulars. We had received a telegram to the effect—as it was read here awhile ago. Mr. Goden stayed there that night, and the next morning he mentioned to us that he expected a letter verifying this telegram; that our contract was cancelled and that he had Vick Brothers there to take over our stock and fixtures and take hold of the business.

Q. Now, did you and Mr. Goden come to any understanding as to how you would sell them?

A. We told Mr. Goden that we didn't consider our contract cancelled yet, and that we had a nice business there and we didn't care to go out of it. Well, he maintained that we would see that our contract was cancelled and we just as well begin negotiating some kind of a deal for straightening it out. So he mentioned, he

says, "I have always dealt fairly with you boys. I wish you would take my advice." He says, "I will tell you what I advise you to do because," he says, "you can't afford to resist this because the Ford Motor Company—the large capital they have behind them, they will carry this thing along in the various courts, and you will get off at the little end of the horn in the long run anyway." So we didn't know what to say or do, but he told me of a deal that he had put through up at La-Grande where the man—he told me how to get out of it easy, and that he didn't follow his advice with regard to it, and he afterwards admitted that he should have followed his advice with regard to it. So we told him that we would think it over, and we would let him know later what we thought about it.

Q. Well, did you and he finally come to any terms?

A. Well, the next morning—that evening Mr. Winchell and I talked it over and we was—well, we was undecided as to what to do. We didn't know where we were at. We felt that the Ford Motor Company would have the upper hand of us, and that we better do something, and we decided that night to accept their offer, provided they paid us back our full amount that we had invested in the cars, and that Vick Brothers took over our stock including parts and garage extras that we had for repairs, tools, and our accessories, typewriter, including a desk and various fixtures that we had, at the full retail price, that is, what we paid for them.

Q. What about the bonus money and contract money?

A. The bonus money was to be forthcoming from

the Ford Motor Company; it was understood that was to be paid to us on the volume of business that we had done up to that time.

Q. Including these cars in question?

A. Including the cars in question.

Q. What about the amount you had deposited with them? Did he agree to give you that?

A. Yes, sir, we had \$800.00 deposited.

Q. Did they keep that arrangement? Did they carry that out?

A. No, sir.

Q. Did Mr. Goden leave?

A. Well, we told Mr. Goden that upon the payment of that in cash that we would accept it, and that we couldn't consider anything else but a cash proposition; so he says that he could get the cash, and he says, "You leave it to me; I will go to Portland, and I will fix this up." So he left for Portland.

Q. And when he came back, what occurred? Tell the jury.

A. When he came back, I don't remember just how we met Mr. Goden, whether we talked to him over the phone or met him personally. Anyway we agreed to meet him at the Osborne Hotel Friday night.

Q. Who went to the hotel?

A. Well, Mr. Winchell and I, our attorney, Mr. Hardy, went to the hotel that evening, and met Mr. Goden and Mr. Vick in the lobby and we introduced each other all the way around, and Mr. Goden suggested that we go up to his room, so we did so, and Mr. Winchell asked Mr. Goden if he was ready to pay over the cash—

the money. Well, Mr. Goden said that he couldn't do that; that after interviewing the managers at Portland, why they had objected, but they had agreed to pay over the 85% list price of the cars in question on the cars that we had in stock at that time.

Q. What about the contract money and bonus money? Your own money that was deposited and your bonus money?

A. Well, he said that could be taken care of afterwards. He says "I can't say; you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85%."

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that we were entitled to our bonus money and also to our deposit, and he said, well he says, "I am only authorized to pay you the 85%," and he says "I have the authority, or have the money at the First National Bank, and can make you a check tomorrow morning."

Q. Do you recall then what I said?

A. Well, Mr. Hardy mentioned that we would take this under advisement, and immediately Mr. Goden mentioned that the deal was all off; well, Mr. Hardy says, "Then it is time for us to go. We will just simply take this under advisement." And we got out, half way to the door, and Mr. Goden repeated that.

Q. Repeated what?

A. That the deal was all off; when we got out to the elevator and was stepping in, and he followed out there, and Mr. Vick and Mr. Goden said that the deal was all off.

Q. What happened next after that?

A. Well, wait a minute now.

Q. The Marshal came and took the cars?

A. Well, the next day was Saturday and we didn't hear anything from anybody. I think that was Saturday.

Q. What happened Monday morning?

A. Well, Monday morning, shortly after I had opened the garage, in came Mr. McDougall, the man that testified here this morning, and a deputy United States Marshal, and also the Marshal himself, and mentioned the fact that these cars were now to be taken by the United States Court.

Q. The cars were replevined then?

A. And the cars—they began to tack on a notice on each car.

Q. Now, in the meantime, had Vick paid you for the other business?

A. We had invoiced the stock, and Vick Brothers had voluntarily paid us a thousand-dollar deposit; we in turn had given them a receipt, conditioned on that receipt that when everything was settled up with the Ford Motor Company, and we got our 85% value of the cars back and the deposit money and also the bonus money that we were entitled to, that then we would—

Q. Did the thousand dollars cover the sale of the other business to Vick Brothers, or was there still more to be paid by Vick Brothers?

A. Yes, there was in the neighborhood—the stock invoiced at about two thousand dollars, and you might say they had paid us half of that amount.

Q. What is the fact as to whether or not the sale

of Vick Brothers was conditioned and to be completed on fulfillment of the deal with Goden and the Ford Motor Car Company?

A. Yes, that was the condition.

Q. And that has not been done?

A. No, sir.

Q. And you are in litigation with Vick Brothers now, over the possession of that business?

A. Yes, sir.

Q. But you have been out of it until you can try your lawsuit, is that right?

A. Yes, sir.

Q. What do you say, Mr. Hathaway, as to the volume of business you were doing, first as to the number of cars you were selling each year—that you actually sold?

A. When we took over the business in October, 1913, we signed up for eighty cars; the previous agent had sold twenty-six the previous year. We sold eighty-eight cars the first year; the second year we signed up, I believe, for one hundred and forty-four cars, and if I remember correctly the Ford Motor Company considered that we sold one hundred and seventy-some-odd cars the second year. The third year when we were notified by telegram to come down and sign up for a new contract, the Ford Motor Car Company asked us to sign up for one hundred per cent more cars than we did the previous year. Well, we thought that was quite an undertaking, but we found out that had to be done or else we couldn't sign up, so it was the Ford Motor Company's estimate, and we just let it go at that and signed;

so we signed up for two hundred and eighty-eight cars.

Q. How many had you sold at the time of the replevin action?

A. The Ford Motor Car Company would consider that we sold 179 cars, because when you take the cars of the Ford Motor Company, they consider them sold.

Q. That is when you pay for them.

A. Yes, sir.

Q. That included these thirty-seven cars?

A. Yes, sir.

Q. When you take the cars from the Ford Motor Car Company and pay them, they figure that on your bonus, just as if you passed them out to the public, do they?

A. Yes, sir.

Q. That is they were sold as far as the Ford Motor Car Company is concerned.

A. That is the way.

Q. And fully paid for, as far as you are concerned?

A. Yes, sir.

Q. And if you don't sell them again yourself, that is your loss, is it?

A. They remain our property.

Q. In all the three years you dealt with them—

JUROR: I would like to ask if they have to sign a contract each year for these cars?

A. Yes, sir.

JUROR: The same old contract or a new form of contract?

A. Why, it is changed a little; it seems to be about the same thing.

Q. Have you ever read through and studied the language, and know the meaning of all the fine print in it?

A. No, sir.

Q. These forty-eight odd paragraphs?

A. No.

Q. Now, Mr. Hathaway, in all the years you have dealt with them has there ever been a time, a single instance, but what you have had to pay for the car on delivery, to you?

A. No, we only pay the one price.

Q. And you pay that on delivery of the car?

A. Yes.

Q. And you treat the car as yours and go on and sell it or dispose of it as you like?

A. Yes, sir.

Q. You have done that for three years?

A. Four years I was with the Ford Motor Company?

Q. You were their agent over in Eastern Oregon?

A. Yes, sir.

Q. Were you ever called upon to pay any further price than the price you pay on delivery?

A. No, sir.

Q. In all the 437 cars that you sold at Eugene, did you ever pay a cent extra over and above the price you were required to pay to get the cars?

A. No, sir.

Q. Were you ever asked to?

A. Never asked to.

Q. Did they ever claim anything different?

A. No, there was nothing.

Q. Now, you describe to the jury what kind of business you were doing there, whether it was an increasing or decreasing business, the character of the business.

A. Our business was on the increase from year to year, and increased according to the number of cars that we were selling; what I mean by that is that each and every car we sold, we sold more or less accessories on, and done more or less work for. As they would become old, why, we had to do various work for them—various kinds.

Q. What do you estimate that general business, outside of the sales of the cars, as to your profit?

A. We always figured that our business was paying—well, we thought conservatively three hundred a month—our garage end of the business.

Q. Then there was the profit on the cars besides?

A. Yes, sir.

Q. And you made 15% on the cars besides the bonus?

A. Yes.

Q. Now, you have been there doing business three years. What is the fact as to whether you had got pretty well acquainted in Lane County?

A. Well, Eugene is not a very large city, and we had opportunity of becoming very well acquainted, because we had an established business there, and were known all throughout the country mostly, with the exception of over on the coast.

Q. What would you say as to whether or not you had the good-will of the people up there—I know you are modest about it?

A. I would rather somebody else would say that. Why, I think we stood pretty well in the community.

Q. Please tell the jury what other offers you have had this summer to go into business?

MR. McDOUGALL: I object as incompetent, irrelevant and immaterial; that is objected to; it certainly would not tend to show damages in this case.

MR. HARDY: It would show we are tied up so we couldn't go into business. We could have gone in if we had had the money.

COURT: Ask if they did go into business, and if not, why not.

Q. Did you have any other opportunities to go into business this summer?

A. Well, Mr. Winchell and I—at this time when my mother drove over into Eastern Oregon, and when we arrived at Pendleton, Mr. Simpson, of the Ford Motor Company there, their representative, told us there was a man there waiting us at the hotel, for a couple of days—

Q. Just tell what the offers were. Don't go into all the details.

A. He wanted to offer us the Studebaker line. Then when we got over to Walla Walla we had an opportunity to take on the Buick line there, but on account of lack of funds, our funds being tied up, we were not able to do anything.

Q. Your money being tied up in these Ford cars?

A. Yes, sir.

MR. McDOUGALL: Will the court allow an exception to my objection?

COURT: Yes.

Q. So you have not been able to go into any business on account of your capital being tied up in this manner?

A. Until we get our money.

CROSS EXAMINATION.

Questions by Mr. McDougall: Mr. Hathaway, you say you figure you made approximately \$300.00 per month net on this business of yours down in Lane County—in Eugene?

A. Yes, sir.

Q. And how was this money made? From the fact that you were the Ford agents down there?

A. Why, I should say yes; and then we were in business there and we were selling gasoline, lubricating oil, tires and accessories; doing repair work.

COURT: What do you mean by accessories?

A. Accessories like speedometers and bumpers.

COURT: For cars other than the Ford?

A. Yes, although we specialized a great deal on the Ford cars.

Q. Now, you say in your answer here in which you are asking damages, that you were put out of business after this action was instituted?

A. Yes, sir.

Q. This action was instituted on June 3, 1916, was it not?

A. Monday. Is that Monday?

Q. Yes.

MR. SMITH: No, June 3rd was Saturday; June 5th was Monday.

Q. That is when the cars were taken from you, and you claim that your business was ruined by the acts alone of the Ford Motor Company in going down there and taking these cars away, do you not?

A. It certainly was.

Q. And for that you ask to hold them responsible in this case?

A. We do.

Q. Is it not a fact that you have set up the same claims in a case which Vick Brothers have brought against you, enjoining you from interfering with their business down there?

A. I don't get your meaning.

Q. (Read as follows: Is it not a fact that you have set up the same claim in a case which Vick Brothers have brought against you, enjoining you from interfering with their business down there?)

A. I suppose in a way that would be considered so.

Q. You have filed an answer down in Lane County in the suit of E. C. Simmons, Charles H. Vick and George F. Vick, partners doing business under the name and style of Vick Brothers vs. V. W. Winchell and F. M. Hathaway, partners doing business under the name and style of Eugene Ford Auto Company, defendants, in which you alleged, didn't you, that George F. Vick entered your premises and undertook to interfere with defendants—that would be Winchell & Hathaway—“in the use of the telephone in the office of said business,

and made an assault upon these defendants, and defendants ordered him from the premises and he departed from the premises and forthwith commenced this suit. That defendants are the owners and entitled to possession of said premises and the whole thereof, and of the said business and of all the property described in the complaint and herein described; and plaintiffs"—that is Vick Brothers—"wrongfully asserted a claim to have some right therein, the exact nature of which defendants"—that would be you—"do not know, and have commenced this suit for the purpose of harassing these defendants"—that would be you—"and annoying them in the conduct of their business; and for the purpose of causing them trouble and expense in the conduct thereof, and for the purpose of seeking to drive them out of said business." Now, that answer was signed V. W. Winchell on the 13th day of June, a week after you claim that the Ford Motor Company put you out of business. Is that not true? Do you remember that?

A. Yes, sir.

Q. Can you reconcile your sworn answer in that case with the statement you have just made to this jury that the Ford Motor Company were absolutely responsible for the destruction of your business?

A. I would answer it in this way: That the Ford Motor Company stopped us from carrying out our deal with Vick Brothers and of course we interfered with having Vick Brothers come in and take that proposition at all until this other was settled, and I guess we interfered enough that it caused Vick Brothers and Simmons

to bring an action against us. Well, of course we had to answer in that action.

Q. How much did you sell this business that you claim was worth \$25,000 to Vick Brothers for?

A. You must understand that we were forced out of business.

Q. Never mind; just answer the question.

MR. SMITH: He is answering in his own way.

MR. McDOUGALL: No, he has not answered it at all.

Q. (Read.)

MR. SMITH: He says they were forced out of business.

A. Forced out of business and we—

COURT: What did you sell it to Vick Brothers for? What did they agree to give you for it?

A. They agreed to give us the invoice price on everything.

Q. And you agreed to accept that?

A. We had to.

Q. Now, do you remember what the invoice price of the parts were?

A. The full amount—and fixtures and all—between eighteen hundred and two thousand dollars.

Q. And did you receive anything as part payment on that?

A. We received one thousand dollars.

Q. And have you got that money yet?

A. Yes, sir.

Q. When these parts were checked over, do you

recall whether you were short some \$202.57 worth of parts?

A. I remember that I told Mr. Simmons or Mr. Vick—I don't know which it was—that we had taken a few parts from this stock of cars that we had, in order to accommodate people who might come in—when they damaged a fender or say a lamp—and we would just simply take it from our stock of cars and replace it by ordering from the Ford Motor Company. There was a little shortage there. I don't know just exactly the amount; didn't amount to a great deal.

Q. Now, you say that when Mr. Goden was down to Eugene, you talked over and discussed the matter of adjusting this contract, and Mr. Goden left you with the statement or the substance was to the effect that you should leave it to him and he would go to Portland and fix it all right?

A. Mr. Goden said, "I have always played fair with you boys, and you just leave it to me."

Q. And you understood he was coming up to Portland and see the manager?

A. Yes, sir.

Q. Then when he came back from Portland, what did he inform you as to the manager's position in the matter?

A. He objected.

Q. And what did he say they would do?

A. They would pay us the 85 per cent of the selling price or list price of the Ford cars—these cars that were in question.

COURT: That is they would return to you the money you had paid on the cars—was that it?

A. Yes, sir.

Q. And you refused to accept that?

A. Yes, sir.

Q. How many cars did you sell yourself, exclusive of the sub-agents in your territory, during the life of this contract, which terminated in the fall of 1916?

A. I couldn't say the number of cars.

Q. Well, can you estimate approximately?

A. No, I can't really tell you just exactly the amount.

Q. Did you look it up in the books here when I asked your partner the question?

A. No, I didn't.

Q. Can you find it now. How do you base your gross, or rather your net profits in this business without knowing something about that?

A. Well, on the volume of the business.

COURT: You sold during the year, or there were sold through your agency 179 cars, I understand?

A. Yes, sir.

COURT: How many of those 179 cars were sold by sub-agents? You had three sub-agents, didn't you?

A. Three sub-agents, yes, sir.

COURT: Now, how many of those 179 cars did they sell?

A. I believe that Junction City sold in the neighborhood of fifteen cars; Creswell sold eight or ten—let me ask again. Is this for the '15 contract or the last?

Q. The one that terminates August of this year.

A. Cottage Grove has sold somewhere around fifteen cars, fourteen or fifteen.

COURT: That is about thirty-nine.

Q. What about Springfield? Didn't you have an agent at Springfield.

A. Springfield sold one or two cars.

Q. Then you really had four sub-agents instead of three?

A. Yes, he had a contract but he said he didn't have the money so we just ran a car over to Springfield, only three miles, and left it with him, and when he sold it, he came over and got another one.

MR. McDOUGALL: If the court please, I have a certified copy of the answer in this case of Simmons et al. vs. Winchell et al., which I desire to introduce in evidence here. Copy of the complaint and answer.

Marked PLAINTIFF'S EXHIBIT 4.

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR LANE COUNTY.

E. C. Simmons, Charles H. Vick, and Geo.

F. Vick, partners doing business under
the name and style of Vick Bros.,

Plaintiffs.

vs.

V. W. Winchell and F. M. Hathaway, part-
ners doing business under the name and
style of Eugene Ford Auto Co.,

Defendants.

COMPLAINT.

Plaintiffs for cause of suit against the defendants allege the following facts, to-wit:

That the plaintiffs are now and were at all times mentioned herein partners doing business under the name and style of Vick Bros., and have duly registered their assumed business name with the county clerk of Lane County, Oregon.

That the defendants are now and were at all times mentioned herein, partners doing business under the firm name and style of Eugene Ford Auto Co.

That on May 29, 1916, plaintiffs and defendants entered into a contract whereby plaintiffs agreed to purchase from defendants, and defendants agreed to sell to plaintiffs, all cars, fixtures, accessories and parts of the Eugene Ford Auto Co.; stock, fixtures and parts being of the invoiced value of \$1825; cars consisting of 36 Ford Touring cars of the value of \$423.25 and 1 Sedan of the value of \$649.00, and the plaintiffs agreed to pay and the defendants agreed to accept the sum of \$1825.00 for the stock, fixtures, and parts, and \$423.25 for each of the 36 Ford Touring cars, and \$649.00 for the Sedan, and defendants were to give plaintiffs possession of the building at 275 Eighth Avenue West, in Eugene, Lane County, Oregon, with the further understanding and agreement that the above mentioned understanding and agreement was not to be binding unless the Ford Motor Co. paid the Eugene Ford Auto Co. all bonus money due them and returned the contract deposit money that the defendants had given the Ford Auto Co. and that

the said sale was subject to the said condition that the Ford Auto Co. perform as above set forth.

That in pursuance of said agreement and in compliance therewith plaintiffs as part of the said purchase money paid to the defendants the sum of One Thousand Dollars and defendants immediately gave the plaintiffs possession of all of the above mentioned property and gave plaintiffs the key, and gave plaintiffs possession of the building where they were at that time doing business, to-wit: at 275 Eighth Avenue West, in Eugene, Lane County, Oregon, and plaintiffs were to pay the balance of the purchase money as soon as the defendants demanded the same, and defendants have never demanded the payment of the same, but plaintiffs have tendered the balance of the money to the defendants and defendants have refused to accept the same and informed plaintiffs that the defendants and the Ford Auto Co. were unable to reach a satisfactory agreement and they do not want the balance of the said money until the defendants and the Ford Auto Co. reach a satisfactory agreement.

That plaintiffs have leased the said building at 275 Eighth Avenue, West, from the owner thereof and with the consent and approval of the defendants and have purchased other supplies and have been conducting the said business in Eugene, Lane County, Oregon, ever since said time.

That each of the defendants have been for a couple of days and are now interfering with the plaintiffs and with their personal and real property above referred to and lock and unlock the doors of the room at 275 Eighth

Avenue, West, in Eugene, Lane County, State of Oregon, and take money out of plaintiffs' cash register, and trespass on plaintiffs' property above described and sell their personal property and interfere with plaintiffs' customers and with plaintiffs' business in general at the above mentioned place in Eugene, Lane County, Oregon.

That plaintiffs have offered to return the above described property to the defendants if the defendants will return the \$1000.00 to the plaintiff and make an accounting for the property that plaintiffs' purchased elsewhere and which defendants have appropriated to their own use, all of which defendants refuse to do.

That plaintiffs have no speedy, adequate or complete remedy at law, and plaintiffs will be greatly damaged unless the defendants are restrained, and plaintiffs will suffer irreparable injury.

Defendants threaten to break into plaintiffs' said building and threaten to continue selling plaintiffs' property, and also the property which defendants have transferred and delivered to plaintiffs, and threaten to keep using plaintiffs' property, and keep trespassing on plaintiffs' said premises, above described in violation of plaintiffs' rights.

Wherefore plaintiffs pray for an injunction against the defendants restraining them from interfering with plaintiffs, or with the personal property above described, or with the building above described, and restraining them from trespassing on plaintiffs' premises at 275

Eighth Avenue, West, in Eugene, Lane County, Oregon.

L. M. TRAVIS and
A. K. MECK,
Attorneys for Plaintiff.

State of Oregon,
County of Lane—ss.

I, Geo. F. Vick, being first duly sworn, depose and say that I am one of plaintiffs in the above entitled suit and that the foregoing is true as I verily believe.

GEO. F. VICK.

Subscribed and sworn to before me this 6th day of June, 1916.

L. M. TRAVIS,
(Seal) Notary Public for Oregon.
My Commission expires Dec. 14, 1916.

(Copy)

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR LANE COUNTY.

E. C. Simmons, Charles H. Vick, and Geo.
F. Vick, partners doing business under the
name and style of Vick Bros.,

Plaintiffs,

vs.

V. W. Winchell, and F. M. Hathaway,
partners, doing business under the name
and style of Eugene Ford Auto Co.,

Defendants.

ANSWER.

Comes now the defendants and for their answer to the complaint filed by plaintiffs herein admit that the plaintiffs were and are co-partners as alleged in the complaint.

Admit that the defendants were and are co-partners as alleged in the complaint.

Deny each and every other allegation contained in said complaint, except as hereinafter expressly admitted and except as hereinafter alleged.

For a further and separate answer and defense these defendants allege the truth to be:

That the defendants are now and were at all the times mentioned herein co-partners doing business under the firm name and style of Eugene Ford Auto Company, and their assumed business name was and is duly registered with the County Clerk of Lane County, Oregon.

That these defendants on the 29th day of May, 1916, and for a long time prior thereto were engaged as such co-partners in conducting an automobile and garage business at Eugene, in Lane County, Oregon, and engaged in buying and selling automobiles manufactured by the Ford Motor Company of Michigan; and were engaged in buying and selling gasoline, accessories, oils and parts of automobiles used and incident to the automobile business and the garage business, and that the plaintiffs, as co-partners and the Ford Motor Company, a corporation organized and existing under the laws of the State of Michigan, entered into a contract with the defendants wherein and whereby the plaintiffs

and the said corporation proposed to these defendants that the defendants should sell their business, stock, fixtures, parts and automobiles and deliver the same to the plaintiffs; and the defendants, in answer to said proposal proposed to sell their business at the special instance and request of the plaintiffs and the Ford Motor Company, a corporation, provided that the plaintiffs and the said Ford Motor Company should pay, or cause to be paid, to the defendants the purchase price of thirty-six Ford touring cars and a Sedan Ford car, to-wit: the sum of \$15924.25, to which amount should be added the sum of Eight Hundred Dollars and the further sum of \$1960.60 and the further sum of \$1825.00, being the invoice price of fixtures, parts and other materials incident to the business and included in the stock of these defendants; and by the terms of said proposal made by these defendants, as aforesaid, all of said sums of money were to be paid to the defendants, and payment and delivery of said property were to be concurrent and the plaintiffs and the said Ford Motor Car Company then and there on the 29th day of May, 1916, stated to these defendants that they would accept said proposal and would pay the said sums of money and await delivery of the property until payment was fully made in case of the whole sums of money to be paid, as aforesaid. That these defendants retained possession of the said property and the premises where the said business was carried on and were and are the owners of the lease of the building mentioned in the complaint, and permitted the plaintiffs to assist in invoicing the said stock and to be in and about

the said premises and to observe and learn how the said business was conducted, but these defendants retained control and possession of the said property and the whole thereof, and that the plaintiffs and the said Ford Motor Company wholly failed and neglected to pay any part of said purchase price, except the plaintiff paid to defendants the sum of One Thousand Dollars as earnest money to apply on said purchase price if the said purchase was completed in accordance with the provisions hereinafter set forth, but otherwise to be and become the property of these defendants. That the plaintiffs and the said Ford Motor Car Company have wholly failed to pay any of the sum of money to be paid, and agreed to be paid, as hereinbefore set forth save and except the sum of One Thousand Dollars, and have neglected and refused to pay the same, or any part thereof, save and except the said sum of One Thousand Dollars, and notified these defendants they would not pay the said purchase price or any further sums upon the same, and repudiated said contract; and the plaintiffs have lingered about the said premises of defendants, but prior to the commencement of this suit left the same and abandoned said contract; and on the day of the commencement of this suit one of the plaintiffs, to-wit: Geo. F. Vick, entered said premises and undertook to interfere with these defendants in the use of the telephone in the office of said business, and made an assault upon these defendants, and defendants ordered him from the premises and he departed from the premises and forthwith commenced this suit. That defendants are the owners and entitled to possession of said premises and the whole thereof and

of the said business and of all the property described in the complaint and herein described; and the plaintiffs wrongfully asserted a claim to have some right therein, the exact nature of which defendants do not know, and have commenced this suit for the purpose of harrassing these defendants and annoying them in the conduct of their business; and for the purpose of causing them trouble to drive them out of said business.

Wherefore, having fully answered said complaint, these defendants pray that this complaint be dismissed and that defendants have and recover judgment for their costs and disbursements herein most wrongfully sustained.

L. BILYEU,
THOMPSON & HARDY,
Attorneys for Defendants.

State of Oregon,
County of Lane—ss.

I, V. W. Winchell, being first duly sworn, depose and say that I am one of the defendants in the above entitled suit; and that the foregoing answer is true as I verily believe.

V. W. WINCHELL.

Subscribed and sworn to before me this 15th day of June, 1916.

HELMUS W. THOMPSON,
(Seal) Notary Public for the State of Oregon.
My Commission expires March 27, 1917.

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR THE COUNTY OF LANE.

State of Oregon,
County of Lane—ss.

I, Story M. Russell, County Clerk of the above named County and State, and ex-officio Clerk of the Circuit Court of the State of Oregon for the County of Lane, do hereby certify that the foregoing copies of complaint and answer have by me been compared with the originals, and that they are correct transcripts therefrom and of the whole of the original as the same appear on file in my office now in my official care and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 11th day of August, A. D. 1916.

STORY M. RUSSELL,

County Clerk and ex-officio Clerk of the Circuit Court of the State of Oregon in and for
(Seal) the County of Lane.

Q. How much of your own cash were you using in this business outside of borrowed money

A. All that we had.

Q. Beg pardon?

A. All that we had.

Q. How much did that amount to? How much cash of your own did you have in these cars that were replevined in this action?

A. I don't remember the exact amount, or hardly the amount that we had. We had a—I can say this; when we went to the bank to find out how much capital we had, and if it was a little short we borrowed a little more; just depend. We paid as much as we could. You see we at one time carried fifty-two cars in stock at Eugene through the winter months and it takes quite a large amount of capital to handle the business, but we were compelled to take them whether we wanted to or not.

Q. Well, Mr. Hathaway, on April 22, 1916, you had a note at the bank amounting to some twenty-eight hundred dollars, covering seven cars, didn't you?

A. I couldn't say; we never really—we had confidence in the bank to take care of our business for us.

Q. If I showed you these notes would you be able to tell?

A. I can tell the notes that I signed. (Taking notes). That is our signature.

MR. SMITH: What is the date of that, please?

A. April 22nd.

Q. Is that true.

A. Yes, sir.

MR. SMITH: Is that 1916?

MR. McDOUGALL: Yes.

Q. And here is a note dated May 1st, 1916, for \$2800.00. Is that your note covering those cars?

A. Yes, sir.

A. Yes, sir. This is May 1, 1916.

Q. And here is a note dated May 24, 1916, for \$8400.00. Is that your note covering those cars?

A. Yes, sir.

Q. Now, would you say then you had on these particular cars \$12,000.00 borrowed from the bank?

A. Yes, sir—will you please state that question again?

Q. (Read.)

A. Whatever it figures out; it can be figured there. You realize, gentlemen, that we had to sell the cars on time in order to get the volume of business. A great many times men would come in and want to buy a car and pay half down; the balance \$25.00 per month; we had to carry these people, and it took—well in some cases it shows that we haven't a great deal of equity in the cars, yet we had our capital scattered out through the territory in cars sold.

JUROR: That paid you interest?

A. Yes, that paid our interest, and we felt that offset our interest we were paying at the bank.

Q. Wouldn't the bank take care of those cars you sold on time?

A. In some cases they would.

Q. Didn't they in most cases?

A. I couldn't say that.

Q. And if the bank took care of them, you wouldn't need to use your capital then. Isn't that true?

A. Sure.

Q. You don't remember whether it was nearly all of these cases that the bank took care of or not—that you sold on time?

A. No, sir.

Q. Now, you said that your business was on the

increase from year to year? Isn't that naturally true of all Ford dealers?

A. Yes, sir, that is in most places. Now, Mr. Woodson at Cottage Grove dropped back this year. In some territory, why, I suppose it wasn't. In some cases we was overestimated as to the number of cars we could sell.

RE-DIRECT EXAMINATION

Questions by Mr. Hardy: Did you want to sell your business to Vick Brothers, your gasoline business?

A. We had no desire to sell it.

Q. What is the fact as to whether or not that is a part of the transaction which Goden said you had to make to get out.

A. We considered they were joined together; negotiating the deal together.

Q. Did they come there together?

A. They came there together and we were notified by telegram, as was read here before, that Vick Brothers would take over our business; that is the first we knew anything about it.

Q. That is the Ford Company selected the person that you had to sell to; is that right?

A. Yes, sir.

Q. And you felt after what was said to you that you had to go through with the deal as he outlined it.

A. Yes, sir.

Q. If it hadn't been for the action of the Ford Motor Car Company, would you have dealt with Vick

Brothers? Would you have had any notion of selling this business?

A. No, we had no notion of selling out; we were going along.

COURT: Was your transaction with Vick Brothers prior to the time the cars were replevined?

A. Yes, it was—the time that we negotiated—that is began to talk with Mr. Goden; he seemed so positive that the deal would go through just as he stated, that we immediately began afterwards to invoice, before he came back from Portland.

COURT: When was it that Vick Brothers paid you the thousand dollars?

A. That was after the invoice.

COURT: Before or after the time that the United States Marshal took possession?

A. That was before the time.

COURT: Before the Marshal took it?

MR. HARDY: Set out in these pleadings, your Honor, the date; the 29th of May; on the 26th they got the letter cancelling.

COURT: Now, Mr. Hathaway, I understand from your testimony that you claim that the action of the Ford Motor Company in cancelling their contract and replevining these cars destroyed your garage business?

A. Yes, sir.

COURT: And that by reason of that fact you had to close that up or sell it out. Is that the idea?

A. It seems as though Vick Brothers put up a deposit there with the court and took over the business, you see.

COURT: You are claiming here, as I understand it, that you were compelled to virtually close this business because the Ford Motor Car Company cancelled their contract and replevined these cars that you had previously ordered and paid for?

A. Yes, sir.

COURT: And that was the reason you had to close your garage. Now, do I understand from that that you would not have been able to have carried on this garage business if the Ford Motor Company had refused to furnish cars—sell you cars?

A. We could have carried on a general garage business because we were well known in the community, and, for instance, our mechanic who was working for us, immediately went off to himself and started up a little place repairing cars, and is doing a nice business at the present time.

COURT: Then how do I understand that you base you claim that the replevining of these cars destroyed the garage business? You understand this contract only had two months to run, and in any event at the end of that time the company would have been under no obligations to sell you cars.

A. Well, you see Vick Brothers had a deposit on our business and they had us tied up, you see, in a way.

COURT: On what part of your business?

A. The garage end; accessories and parts.

COURT: That is because of their contract or agreement with you?

A. Yes, sir.

COURT: Your idea is then that the failure of the

Motor Car Company, if I understand you correctly—the failure of the Ford Motor Company to carry out the preliminary agreement that you had with Mr. Goden was really the cause of your trouble.

A. Yes, sir.

COURT: That is the idea?

A. Yes, sir.

MR. HARDY: If I may explain. That is set up in this answer that is offered in evidence—a three-cornered deal.

COURT: What I couldn't get clear through my mind was how the mere taking of these cars by the Ford Company away from these people, could destroy their garage business, when that contract only ran for two months.

MR. HARDY: They forced us as a part of it—

COURT: I understand now, I haven't examined this contract, but I suppose it is like all these contracts, and there was no obligation on the part of the Ford Company to furnish these people any cars.

MR. McDOUGAL: The same contract we had up—

COURT: Optional with the company whether they furnished any cars at all, and optional with the dealer whether they would take them.

MR. SMITH: Not optional; the dealers they had to take them.

MR. McDOUGAL: The dealers could cancel.

COURT: Either company could cancel, and the dealer was obliged to take any cars, nor the company obliged to furnish them. That is all. I just wanted to understand his theory. I couldn't get it.

Witness excused.

RAYMOND D. GOULD, a witness called on behalf of the defense, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Hardy: Mr. Gould, where do you live?

A. 593 Carl Street, Portland, Oregon.

Q. What is your business?

A. Buying and selling second-hand Ford cars.

Q. Have you ever been in business with the Ford Motor Car Company?

A. Not in business with them.

Q. What was your business with them?

A. Employe.

Q. What was your position?

A. Was assemblyman and for two months was territory representative.

Q. As territory representative of the Ford Motor Car Company, did you investigate the business of Winchell and Hathaway at Eugene?

A. Also other agents; yes, sir.

Q. State to the jury the kind of investigation you made of Winchell and Hathaway's business, at Eugene. What kind of business they did.

A. I made it a point after calling on the agents in each town, in my spare moments to call on the Ford owners, who owned Ford cars, and in a round-about way, without disclosing my identity, find out the kind

of service they were getting from the agents in that particular district or locality; whether the service was good, or whether they had over-charged them, and whether they were taken care of in parts, and everything that would be of benefit to the Ford owner. I considered it my duty when I was with the company to do that as a protection to the man who owned the car.

Q. Did you report to the company as to whether or not the agent had the good will of the public doing the business?

A. Just verbally; not in writing.

Q. As a result of your investigation of Winchell and Hathaway—the investigation you made on behalf of the Ford Motor Car Company, what did you find as to whether or not they had the good will of their business?

A. Well, I became acquainted with some of the Commercial Club at Eugene, and I found through other sources that they are A-1 in that community; young men who were struggling along to improve their business; they had the support and good will of the bankers, and their name was just as good, and their character just as good as any man that was in the town of Eugene—well thought of.

Q. What about their business standing?

A. Their business—while I was there on my last trip they had all they could do; they sold a car a day the two days I was there, and their prospects were excellent.

Q. Did you make that report to the company at Portland?

A. Verbally, yes, sir. Nothing in writing.

CROSS EXAMINATION

Questions by Mr. McDougal: To whom did you make that report?

A. To Mr. Evans.

Q. And when was this that you visited the Winchell and Hathaway agency?

A. Well, I don't know just exactly the date, but I have my voucher receipts here; my traveling expense account here. But I am of the opinion that it was about—either the last of February or the first of March—between the 15th of February and the first of March, because I made my last trip over into the Bend country.

Q. How many times were you down there? Just this once?

A. Twice.

Q. Twice during that time.

A. Yes, sir.

Q. You were out on the road then all the time.

A. Yes, sir.

Q. How long did you work out on the road for the Ford Motor Company?

A. About two months. From the 15th of January until about the first of March and a little later.

Q. And you are not employed by the Ford Motor Company now?

A. No, sir.

Q. Why were you taken off the road?

A. I don't know.

Q. Wasn't it for drinking?

A. I haven't been able to tell.

Q. Weren't you taken off the road for drinking and incompetency?

A. No, not exactly that. I was informed by Mr. Evans to pack a bottle of booze with me and gin up these agents, and in that way I may be able to sell a few car-load lots.

Witness excused.

MR. SMITH: If the Court please, I think the paragraph you were asking about a moment ago is as follows:

"Clause 41: Estimate of autos required: In order that the first part may determine the prospective requirements of its business for the year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the second party agrees that he will require consignments of not less than 288 Ford automobiles for his said entire territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely:"

COURT: Further on in the contract isn't there a qualification of that?

MR. SMITH: Yes, I will read that. The next section is: "Requisitions May Be Declined: '(42) First party agrees that the foregoing requisitions of the second party shall receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever

in the manufacture and delivery of its product—no legal liability to fill such requisitions being incurred under any circumstances. And the second party may cancel, upon one month's full written notice to first party, the said requisitions or what remains unfilled thereof."

And further on, clause 48 reads: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party, and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from second party prior to the date when such cancellation takes effect."

DEFENSE RESTS

F. B. NORMAN, recalled by the plaintiff in rebuttal.

DIRECT EXAMINATION

Questions by Mr. McDougal: Mr. Norman, referring to this alleged offer of settlement by Mr. Goden, which it has been testified was entered into between Messrs. Winchell and Hathaway, down at Eugene, and Mr. Goden, after that conversation in which Mr. Goden said that he would take up with the office here in Portland the question of settlement, did he come up to see you?

A. Yes, he did.

Q. What did he say?

MR. SMITH: I object to that; that is not material. Counsel knows that, I think. Wholly immaterial because a transaction between them and not in the presence of these defendants, and of which they had no knowledge.

COURT: You are making some claim because the company didn't comply with Goden's agreement, as you claim.

MR. SMITH: Yes, Goden made an agreement they didn't comply with. Now, the point we make is it isn't material as to the reason.

COURT: You haven't shown Goden had any authority to make such contract; he said he would take it up with the company. Counsel has a right to know whether he did take it up and what instructions he had.

Q. (Read) What did Mr. Goden say? What did he report to you?

A. Mr. Goden reported they had not complied with the terms of our contract, and the cars had been sold outside the territory, and we notified him that we would have their contract deposit and their rebate as soon as the territory adjustment and the infringement had been taken care of satisfactory to our office, to comply with the terms of our contract.

MR. SMITH: You notified who?

A. Mr. Goden to convey that message to the Eugene Ford Auto Company.

Q. And did you give Mr. Goden any instructions, instructing him to return to Eugene?

A. Yes, sir.

Q. And what instructions did you give him when he was to return to Eugene?

A. That as soon as the cars had been accounted for and buyer's agreement sent in to cover the cars that had been sent into their territory, that their contract deposit and their rebate would be returned to them, providing, the cars had been sold in their territory, and that their business had been conducted according to the policy of the contract they had signed with us.

Q. Was that ever done by Winchell and Hathaway?

A. They never did, no.

Q. And what was the result?

A. They started in a suit against us to recover this contract deposit and rebate which we withheld until the thing was settled.

Q. In other words, you refused to abide by any agreement that Mr. Goden had made down there because—

MR. SMITH: Object to—

Q. I will withdraw that. Mr. Norman, are you acquainted with this man Gould who testified here?

A. Yes, he was my employe for some time.

Q. You employed him?

A. Yes.

Q. When did he sever his connection with the Ford Motor Company?

A. I don't think he ever severed his connection, in anyways, except he was laid off from time to time, and since that time I understood—

Q. Just a minute; not what you understood. Did you lay him off originally?

A. Yes, sir.

Q. For what reason?

A. For drinking.

CROSS EXAMINATION

Questions by Mr. Smith: You say that under your contract you still hold these deposits and rebates subject to the adjustment of the territory and specifications as to where the cars went?

A. Yes, sir.

Q. Then according to your interpretation of the contract, you first fix the wholesale price to the dealer, don't you?

A. To our agents.

Q. You establish your own wholesale price to your agents?

A. Yes, sir.

Q. And you also establish the retail price that he was to charge the consumer?

A. The contract takes care of that.

Q. Yes, and you bound them down by contract not to vary from that, didn't you.

A. Yes, sir.

Q. And you also limited or restricted them as to territory?

A. Yes, sir.

Q. And you prevented them from selling anybody else's cars?

A. No, sir.

MR. McDOUGAL: The contract takes care of that.

Q. Did you or did you not make these men surrender their contract with Dodge Brothers?

A. No, sir.

Q. You didn't?

A. We have always told our agents we didn't care what kind of a car they sold, but if they did insist on selling other makes of cars than ours, we had a right to revoke their contract, or place the contract with those who would be satisfied with the Ford cars.

Q. Absolutely. You write them a letter to that effect, too, didn't you?

A. No, sir, I don't think so.

Q. What is the difference between your demanding they shall be your exclusive agent and your taking the business away from them if they didn't?

A. Because they don't have to be our Ford agents unless they want to.

Q. But if they want your business at all, they must be yours and nobody else's?

A. If they want that large a contract. They had a big contract.

Q. That is what I mean. If they want to represent you for that large a contract it must be exclusive?

A. Yes, sir.

Q. And must not sell anybody else's cars?

A. No, sir.

Q. And although they sold the cars and you got the money, all the money out of them you could, you still hold back their deposit money and their bonus money

because you say the territory has not been adjusted, and they haven't shown you where the cars went?

A. Because the cars were allotted them for that territory were not sold in that territory that was allotted to these agents.

Q. Well, you got your money out of it, didn't you?

A. Yes, sir.

Q. And you made the cars to sell?

A. Yes, sir.

Q. And you shipped them to them to sell?

A. Yes, sir.

Q. And they were selling your cars only. Everything they sold were Ford cars?

A. Yes, sir.

Q. And isn't it a fact also, that your Ford Motor Car Company, although trying to restrict them to a specified territory, reserved the right in itself to go in and sell in competition with them?

A. I don't understand that.

Q. Don't you reserve the right in your contract to go in and sell against them?

A. They were allowed a commission if we did.

Q. You would make the sales and they wouldn't be building up a good business, would they?

A. Sir?

Q. You would make the sales and destroy the good will of their business?

A. Very few cars ever sold in their territory by us. In fact never was a car sold in their territory for which they didn't get commission.

Q. Please say how much commission you pay them if you sell the entire territory.

MR. McDOUGAL: The contract provides for that.

MR. SMITH: Show us the clause of the contract that shows that.

A. Have Mr. Goden do that.

Q. He says you know it.

A. Wouldn't take long to see it.

MR. GODEN: Five per cent is the amount.

Q. Find it in the contract.

MR. McDOUGAL: Paragraph 31 reads: "* * and in such case will pay one (and only one) commission of 5% of the list price of the automobile or automobiles so sold after it shall have received the full purchase price in cash, to the second party, or if there shall be a sub-limited agent in that special territory and locality where such sale is made then such five per cent shall be paid to such sub-limited agent. This provision shall not apply to sales of parts or accessories which are otherwise provided for herein, nor shall it apply to sales to or through sub-limited agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Section 4 of this agreement. First party shall not pay any commission to second party or his sub-limited agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory."

Q. So that is the clause to which you refer, is it? This clause to which you refer is the one Mr. McDougal read?

A. I imagine so.

Q. Do you know whether it is or not?

A. Yes.

Q. Well, is it?

A. Yes.

Q. Now, you say under that the Ford Company can go into their territory and sell machines?

A. We can, yes. If they are not going after their business, we can send our own men in.

Q. It doesn't say anything about that here, does it—if they are not going after their business?

A. It does, yes.

Q. Find it in the contract.

A. Specified in this way—if they are not working the territory, we can cancel the contract.

Q. That is another question. What this says is (Paragraph 31): "First party"—that is the Ford Company back east?

A. Yes, sir.

Q. The Ford Company "hereby expressly reserves to itself the right to make direct sales to customers in the territory above described"—nothing said there about their failing to discharge their duty there, is there. It expressly reserves the right?

A. Yes, sir.

Q. "And in such cases will pay one (and only one) commission of five per cent." Their commission was 15%, wasn't it, if they made the sale?

A. Yes, if they made the sale.

Q. "of the list price of the automobile or automobiles so sold after it shall have received the full purchase

price in cash, to the second party, or if there shall be a sub-limited agent in that special territory and locality where such sale is made, then such five per cent shall be paid to such sub-limited agent." Would come to them only if there is no sub-limited agent down there?

A. It would, yes.

Q. And they wouldn't get anything—

A. It would be included in his volume of business.

Q. "This provision shall not apply to sales of parts, or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through sub-limited agents, but only to those made by first party directly to purchaser domiciled or residing in said territory within the meaning of section 4 of this agreement." So you could sell to as many people as were not domiciled or residing in their territory as you wanted to?

A. Yes, sir.

Q. Without paying them any commission at all.

A. Pay them five per cent.

Q. No.

A. We always did.

Q. Where it says here, "This provision shall not apply to sales of parts or accessories which are otherwise provided for herein, nor shall it apply to sales to or through sub-limited agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of section 4 of this agreement. First party shall not pay any commission to second party or his sub-limited agent on any sales to residents outside second party's territory even

though delivery should be made within said territory to, residents of such other territory?"

A. Well, we never sold any cars in their territory.

Q. I am asking you what your contract reserved the right to you to do, not what you actually did.

A. Just what it says.

Q. That you could sell a thousand automobiles if you had a chance to people down there right in Eugene?

A. Absolutely.

Q. And deliver them in Eugene?

A. And deliver them.

Q. And not pay them a cent commission?

A. If we wanted to.

RE-DIRECT EXAMINATION

Questions by Mr. McDougall: Just one more question, Mr. Norman: The same provision would apply to this contract, would it not, that Winchell and Hathaway, for instance, could go into the territory of their sub-agents and sell cars?

A. Absolutely.

Q. Upon paying the sub-agent a five per cent commission?

A. Certainly.

Witness excused.

George Evans, a witness called by the plaintiff in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. McDougall: Mr. Evans, what is your business?

A. Wholesale manager of the Ford Motor Company.

Q. For what company?

A. Ford Motor Company.

Q. Were you wholesale manager for the Ford Motor Company during the months of January, February and March, 1916?

A. Yes, sir.

Q. Are you acquainted with a former employe of the company by the name of Gould?

A. I know him, yes

Q. Was he employed under you?

A. He was.

Q. For what length of time?

A. About—practically a month or six weeks.

Q. In what capacity?

A. As traveling representative

Q. Did you, during the time that he was employed by you, instruct him while out on the road to carry a bottle of liquor with him, or—as it was put here, booze—and “gin the agents up?”

A. No, sir; emphatically not.

Q. Absolutely never gave him any instructions of that kind?

A. Never.

No cross examination.

Witness excused.

PLAINTIFF RESTS.

DEFENSE RESTS.

Whereupon proceedings herein were adjourned until tomorrow morning.

Wednesday, September 6, 1916.

MR. SMITH: There are two or three motions in relation to the record we want to make to keep the record straight on the evidence. We first move to strike from the consideration of the jury all evidence offered on behalf of the plaintiff as to the payment to the First National Bank of the twelve thousand dollars on the ground that it was not authorized by the defendants or made through any privity of relationship requiring plaintiff to make such payment. Upon the further ground it was a voluntary payment if made at all and cannot be charged to the defendants under any circumstances.

COURT: I think that is well taken as far as constitutes any defense in this case.

MR. SMITH: The defendants move that the jury be instructed that the plaintiff has no case to submit to them, under the plaintiff's own evidence, first because the contract involved is in violation of the Sherman Anti-Trust Act and the Clayton Act, and being violative, the title to the cars absolutely passed when the drafts were paid, and that the plaintiff itself has shown that the plaintiff has no title to the cars whatsoever, but they were fully paid for by these drafts, and the title is in the defendants, and at the time this case was instituted the defendants owned the cars absolutely. Second, that the plaintiff has proved no demand before entering this

action, and even if the contract were not in conflict with the Anti-Trust Acts of the United States, it provided they would have a lien on these cars for the amount of money they advanced, and they never extinguished or offered to extinguish that, but began suit without any demand or tender.

COURT: Isn't there a provision in the contract by which the plaintiff company could recover possession of these cars upon payment of advances?

MR. SMITH: They haven't paid them. There is a provision to this effect: "This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation for all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

In case of the cancellation or expiration of this contract the first party may at its option retake possession of all of such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said limited agency) to take orders for the sale of such automobiles

as he may have on hand unsold at the time of such cancellation or expiration, the same to be made strictly under and in accordance with the terms of this contract, provided however, if after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use for such other disposition as he may choose to make."

My point is they were all sold and were not consigned. That consignment we say depends upon the prior contract which we say is violative of the anti-trust laws. We take it that the transaction was an absolute sale and not consignment. They attempted to treat these cars as having been consigned but they didn't tender the amount we had paid into them, and right there is a strict provision that if they proceed on that theory they must at the same time "return to him his advancements on the said automobiles," which they never did. So either way we have it—if the contract violates the anti-trust laws of the United States, the cars are ours; if it does not violate them, they didn't tender or offer to return the advancements, and in either case they are out of court, and, as counsel has suggested, if their contract is valid we were lawfully in possession of these machines, even if they owned them—we had acquired them lawfully and had a lien for 85 per cent on advances, and they didn't extinguish that lien and

didn't make a demand, and the rule is absolute when a person can replevin personal property, even though it belongs to another, demand must be made for the return or the action for replevin will not lie.

COURT: As I interpret this contract, for the purposes of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale. In any event the contract provided that the Ford Motor Company might recover possession of them in case the contract was cancelled upon returning the advances, but before it could recover, it must return the advances or at least tender them, and the evidence in this case shows it did neither—it did not return the advances nor did it tender the money. All the evidence is Mr. Goden said he had the money in the bank but never offered to pay it—never gave the defendants any opportunity to accept it, but proceeded to institute this action without complying with their contract, and therefore I think as far as that feature of the case is concerned the defendants are entitled to a ruling instructing the jury to return a verdict in their favor for possession of this property.

MR. SMITH: Or their value if possession cannot be returned. That leaves the case open for determination by the jury of the question of damages.

COURT: What about the \$800?

MR. SMITH: The \$800.00, as I understand, is a deposit we put up in cash in order to get their contract, a requirement they made of us; to enter in their employment we had to deposit \$800.00; that is all the consideration for that. We are entitled to that also.

The \$800.00 is cash, cold cash, belonging to us, they have. Now, they have cancelled the contract and are holding without consideration.

COURT: Something said about deposit in court; what is that. Does that cover this \$800.00?

MR. SMITH: No, it does not cover—is not figured in. I can't figure it. Mr. McDougall can figure that.

MR. McDOUGALL: The deposit of \$800.00 is covered by paragraph 40 of the contract, "As a guaranty of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of eight hundred dollars in cash and it is agreed that the first party may, at its option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agent and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party."

COURT: Do you claim there is any showing in

this case, or any evidence showing or tending to show any right on the part of the company to retain this \$800.00?

MR. McDOUGALL: Yes, I think Mr. Norman testified that the contract in this case had been cancelled because of the fact that the defendants here had been selling cars outside of their territory and at reduced prices, and that they had refused to pay over this contract deposit because of these breaches of the contract, and until the matter was adjusted, and it was found out what these breaches were and what they consisted of.

COURT: There is no evidence to show the amount of damages or anything of that kind. Then there is another matter alluded to during the trial—that is the bonus. Is there any controversy about that?

Mr. Smith: No, it was not deposited. Mr. Hathway testified that when Mr. Goden was down there they were figuring up at first and they concluded that Hathaway and Winchell, our clients, were entitled to between \$1800 and \$1900 as a bonus; under these circumstances we take \$1800.00 to be absolutely safe; there is no denial of the testimony; we might ask \$1900.00, but we ask \$1800.00 to be absolutely sure; that was the lowest amount they figured on; they didn't state specifically, but between \$1800.00 and \$1900.00.

COURT: The other issue is the amount of damages if any the defendants suffered by reason of taking these cars?

MR. SMITH: Yes, your Honor, that is one issue, and another matter, in order that we may know how to present it to the jury. The whole case as we view it

falls under the Anti-Trust Laws of the United States. Now, in our answer there is a prayer for and an asking for punitive damages.

COURT: I think you can pass that for I don't think there is any evidence on which to base it.

MR. SMITH: Then we thought the case would fall under the Clayton Anti-Trust Act instead of under the common law, and being under the Clayton Act we ask for single damages.

MR. McDOUGAL: May we have an exception to the Court's ruling on the motion to take from the jury the question of whether or not demand was made upon the defendants and a proper tender made to the defendants before the institution of the action?

COURT: Yes.

MR. McDOUGAL: And also an exception to the ruling of the Court with reference to the amount of \$800.00 deposited by the defendants with the plaintiff for the faithful performance of the contract, and also with reference to the ruling of the Court on the question of the sum of \$1800.00—

COURT: I haven't ruled that the defendants are entitled to recover that; that is for the jury. I was just asking for an understanding of the testimony on that subject.

MR. SMITH: I understood your Honor to rule this case came under the Clayton Act.

COURT: No, I made no ruling. I don't think it is material in this case whether it comes under one act or the other.

MR. SMITH: No ruling. Will the plaintiff have

the opening and closing on our defenses, or will we have it?

COURT: They will have it.

COURT: Mr. Smith and Mr. Hardy, before you proceed with the argument, an examination of the answer shows you have made no claim or issue for either the bonus or the \$800.00, and I have some very serious doubts whether either of these questions should be tried out in a replevin like this and I assume that is the theory on which you filed your answer. You simply ask for a return of the property and \$25,000 damages. Under the record as it stands these two items will have to go out.

Thereupon after argument to the jury the Court instructed the jury as follows:

Gentlemen of the Jury: The case to be submitted to you is an action brought by the Ford Motor Company against Winchell and Hathaway and others to recover possession of some thirty-seven automobiles. The plaintiff claims and alleges in its complaint that in September, 1915, it entered into a contract with Winchell and Hathaway, by the terms of which the latter should become the sales agents of the plaintiff company for the sale of its cars in certain designated territory, with their head office at Eugene. That the contract provided that it might be cancelled or revoked at any time by the plaintiff company without cause, and that in case it was so revoked that the plaintiff would be entitled to the possession or return to it of any cars thereunder which Winchell and Hathaway had on hand at the time, upon the

payment to them of the money advanced by them on such cars.

It is alleged in the complaint that the plaintiff elected to cancel the contract and did cancel it, and that it offered to return to the defendants the amount of money which they had advanced on the cars previously ordered, and demanded possession of the cars then on hand. The defendants admit making the contract. They deny, however, that the plaintiffs ever offered to return the money which they had advanced upon the cars, and therefore claim that the plaintiff was not entitled to the possession of the cars at the time they brought this action, and that the action was therefore wrongfully brought, and by reason of that fact the defendants have been damaged in their business to the amount of \$25,000.

Now, the contract as entered into between the plaintiff, the Ford Motor Company, and the defendants, as I said, was dated September 10, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company exercising the right given by this contract, did in fact cancel it by a telegram which it sent to the defendants, and by registered letter which was received by the defendants prior to the time this action was instituted. It also appears in testimony that at that time the defendants had in their possession some 37 cars which they had previously ordered from the plaintiff, upon which they had paid 85 per cent of the list price, or all that they were expected or required to

pay under the contract. The plaintiff company, upon the cancellation of this contract was entitled to a return of the cars which the defendants had on hand at the time, upon the payment or repayment to them of the amount of money which they had advanced or paid for the cars, which is admitted by the parties to this case to be \$16,077.50, so that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants the \$16,077.50 but the evidence shows that it did not make such payment nor did it tender to the defendants this amount or any other amount on these cars, and therefore it was not entitled to the possession of the cars at the time this action was brought, and inasmuch as it was not entitled to the possession the action was wrongfully brought and the defendants are entitled to a return of the cars, or their value in case a return cannot be had, so that in any event it will be your duty, under the law, to find a verdict in favor of the defendants to the effect that they are entitled to a return of these cars, or their value in case a return cannot be had.

So that the first question for you to determine will be what the value of these cars is. The plaintiff says that they are worth \$16,077.50. That is the amount the defendants paid for them. The defendants, on the other hand, claim and allege that the cars were worth \$18,555.25, which I understand from the testimony to be the retail price of the cars, as specified in the contract between the parties.

Now, it is for you to determine from the testimony in this case what was the reasonable value of these cars, and that amount must not be less than the sum admitted

by the plaintiff, which is \$16,077.50, and it must not be more than the amounts claimed by the defendants, which is \$18,555.25. So you will ascertain that amount and insert it in your verdict.

Then the next question will be whether or not the defendants are entitled to damages from the plaintiff by reason of the fact that the plaintiff wrongfully took possession of these thirty-seven cars. The defendants allege that the effect of the plaintiff's action was to put them out of business—destroy their business—and that by reason of that fact they were damaged in the sum of \$25,000. And they are asking at the hands of this jury a verdict for the return of these cars and for damages they suffered or claim to have suffered on account of the wrongful act of the plaintiff in taking possession of the cars. That is a question of fact for you to determine from the testimony what damages if any the defendants suffered; what was the damage to the defendants' business by reason of the fact that the plaintiff wrongfully took from their business these thirty-seven cars.

Now, in arriving at a conclusion on that subject, it is proper for you to take into consideration the nature and character of the business in which these defendants were engaged at Eugene at the time these cars were taken and determine, if you can, what effect in dollars and cents the taking from them of these thirty-seven cars had upon that business. You should also keep in mind the fact that this contract between the plaintiff and the defendants would expire by limitation on the 31st of July, which was two months after these cars

were taken, therefore the defendants could not, under any circumstances, claim the right to act as the agent of the Ford Company under this contract, or any contract, longer than the 31st of July, 1916, or two months after this transaction.

Again, in estimating the amount of damages to which the defendants are entitled, if any, you should bear in mind the fact that this contract had in fact been legally cancelled prior to the time the plaintiff took possession of these cars. As I said a moment ago, the contract provided that it might be revoked or cancelled at any time by either party without cause, and the Ford Motor Company had exercised its option and right under this contract and had cancelled it, so that it was at an end before they took possession of these cars, and therefore at the time the cars were taken the defendants were in the position of doing a garage business at Eugene without any contract with the Ford Company, and in possession of thirty-seven Ford cars, to which they were entitled. Now, the question is, what was the damage to that business under these circumstances, caused by the plaintiff taking these thirty-seven cars wrongfully from the possession of the defendants.

Now, the defendants claim and allege that their business was entirely destroyed. You have heard the testimony upon that question and it is for you to say whether or not the taking of these thirty-seven cars from their possession and the circumstances under which they were taken destroyed or injured their business, and if so, to what extent, if you can arrive at that conclusion. They allege in their answer that their business was pay-

ing an income of \$300.00 a month and that they were deprived of that income by reason of the wrongful acts of the plaintiff company.

Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants, of course, deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is, if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15% added, or the profits that the defendants would have made if they had sold the cars, then you should not allow the same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages.

Now, the burden of proof is upon the defendants in this case to show by evidence which satisfies the jury, so that you can arrive at an intelligent and satisfactory verdict as to the amount they were damaged, if any, by this act of the plaintiff. It should not be based upon speculation nor conjecture, but upon the facts and circumstances of the case as disclosed by the testimony.

You are the judges, gentlemen, of all questions of fact in this case. You are the judges of the credibility of the witnesses, and it is for you to determine what weight is to be given to the testimony in this case and

what conclusions are to be derived therefrom. There was evidence during the trial tending to show that after this action had been begun the plaintiff company made a payment of some kind to the bank at Eugene, not very clear from the testimony what it was nor how it came to be made, but in any event it is wholly immaterial here. We are wholly unconcerned with that matter at this time, because the controversy here is over the right to the possession of these cars, and damages if any the defendants suffered by reason of the fact that the plaintiff wrongfully took them. The other question is not here for the consideration of the court and jury at this time and need not enter into your deliberations.

There has also been something said during the trial about a deposit made by the defendants with the plaintiff company at the time this contract was entered into. The contract contains a provision to the effect that the defendants would deposit with the plaintiff company a certain sum of money necessary for certain liabilities and to secure certain liabilities. Now, that matter is not before the jury. There is no issue here in this case about that. There is nothing said in the pleadings about it, and there is no testimony here to show whether or not there is any offset against this \$800.00. And the same may be said on the question of bonus. There has been something said during the trial about the defendants having earned a bonus, and to which they are entitled, but that question is not in this record. There is no mention made of it in the pleadings and it is not an issue for consideration by this jury. The only question here is the right to the possession of these cars, and the dam-

ages, if any, which the defendants suffered by reason of the wrongful taking of the cars from their possession by the plaintiff. The other questions, if there are questions between these parties, will have to be determined in some other proceedings and not in this replevin action.

Mr. Smith: The defendants are satisfied with the instructions.

Mr. McDougall: Plaintiff desires to except to the refusal of the court to give the instructions requested.

COURT: Any particular one?

Mr. McDougall: I think you didn't give any except as modified, and especially with reference to instructions concerning the contract which was claimed was entered into on May 29th by the defendants to sell to Vick Brothers. I think you ruled, instead that they failed to prove agency on the part of Goden to effect that settlement.

Mr. Smith: That has nothing to do with the issues submitted to this jury.

COURT: I might call the jury's attention to that, although I think it is not very material. It seems Mr. Goden's interviews with these defendants, the first one he had, was a tentative interview, and he was required to report to his principal for instructions. He had no authority to bind the plaintiff by any contract because he was required to report to his principal and get instructions, therefore there was no contract binding on the Ford Motor Company, entered into by him on the 29th day of May, 1914, because he had no authority to make such a contract.

CERTIFICATE OF REPORTER.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Judge Chambers.

Portland, Oregon.

Ford Motor Company, a corporation,

Plaintiff,

vs.

No. 7163

E. A. Farrington, V. W. Winchell and

F. M. Hathaway et al.,

Defendants.

I hereby certify that I acted as Stenographic Reporter in the above entitled cause and court, reporting fully the testimony given therein on the 5th and 6th days of September, 1916, and that the foregoing is a full, true and correct transcript of all the evidence given on said dates in said cause.

Dated February 5, 1917.

MARY E. BELL,

Notary Public.

My Commission expires on February 1, 1921.

(SEAL)

And now, because the foregoing matters and things are not of record in this cause, I, Robert S. Bean, District Judge, and the judge trying the above entitled action in the District Court of the United States for the District of Oregon, hereby certify that the fore-

going bill of exceptions truly states the proceedings had before me upon the trial of the above entitled action and contains all the evidence, both oral and written, introduced by either of the said parties through said trial and all the instructions of the court on the questions of law presented, and the exceptions taken by the plaintiff therein were duly taken and duly allowed, and that said bill of exceptions was duly prepared and submitted within the time allowed by the rules of the court, as extended by order of court extending plaintiff's time within which to prepare and serve its bill of exceptions up to and including the 12th day of January, 1917, and a further order of the court duly made and entered, extending plaintiff's time within which to prepare and serve its bill of exceptions up to and including the 15th day of January, 1917, and is now signed, sealed and settled as and for the bill of exceptions in the above entitled action, and the same is ordered to be made a part of the record in said action. And it is further ordered that all original exhibits may be deemed attached to this bill of exceptions.

R. S. BEAN,
Judge.

Dated this 10th day of February, 1917.

And afterwards, to-wit: on the 6th day of March, 1917, there was duly filed in said Court, a stipulation, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Ford Motor Company, a corporation,
Plaintiff and Appellant,

vs.

V. W. Winchell and F. M. Hathaway,
co-partners, doing business under the
firm name and style of Eugene Ford
Auto Company, et al.,
Defendants and Respondents.

STIPULATION.

It is hereby stipulated by and between the parties hereto by their respective attorneys that the transcript of record prepared herein containing Citation on Writ of Error, Writ of Error, Amended Complaint, Answer, Reply, Verdict, Judgment, Motion for New Trial, Order Denying Motion for New Trial, Petition for Writ of Error, Order Allowing Writ of Error, Staying Proceedings and Fixing Amount of Bond, Supersedeas Bond, Assignments of Errors, and Bill of Exceptions, as prepared by counsels for plaintiff and appellant, is correct and that the Clerk of the District Court of the United States for the District of Oregon may certify to the correctness thereof without comparing the same or any part thereof with the original pleadings and records on file in his office in the above entitled court.

Dated this 6th day of March, 1917.

E. L. McDOUGAL,
Of Attorneys for Plaintiff and Appellant.

C. G. HARDY,
LOGAN & SMITH,
Attorneys for Defendant and Respondent.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, and in accordance with the stipulation signed and filed on the 6th day of March, 1917, by the plaintiff in error and the defendant in error, through their respective attorneys, do hereby certify that I have not compared the foregoing printed Transcript of Record with the original thereof in the case in said Court of Ford Motor Company, a corporation, plaintiff and plaintiff in error, against V. W. Winchell and F. M. Hathaway, co-partners, doing business under the firm name and style of Eugene Ford Auto Company, defendants and defendants in error, but that the same is a full, true and correct transcript of the record and proceedings (without comparison) in said Court in said cause, as the same appear of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and seal of the above entitled Court this 28th day of March, 1917.

(Seal)

Clerk.

I hereby certify that the within is a full, true and correct copy (and the whole thereof) of the original Transcript of Record in the above entitled cause.

E. H. Douglas
.....

Of Attorneys for Plaintiff and Plaintiff in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-
partners, doing business under the name
and style of PACIFIC TRANSFER COM-
PANY, J. DANIELS, H. SANDGATHE,
doing business as SPRINGFIELD GAR-
AGE, V. W. WINCHELL and F. M.
HATHAWAY, co-partners, doing business
under the name and style of EUGENE
FORD AUTO COMPANY, and A. WIL-
HELM and JOHN DOE WILHELM, co-
partners, doing business under the firm
name and style of A. WILHELM & SON,
Defendants and Appellees.

BRIEF OF PLAINTIFF AND APPELLANT.

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON.

PLATT & PLATT,
McDOUGAL & McDOUGAL,
Attorneys for Plaintiff and Appellant.

ALFRED LUCKING,
L. B. ROBERTSON,
HARRISON G. PLATT,
of Counsel.

Filed
APR 30 1907
F. D. Monckton,
Clerk

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BRIEF OF PLAINTIFF AND APPELLANT.

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON.

STATEMENT.

Plaintiff in this action is a Michigan corporation
engaged in the manufacture of automobiles and

automobile parts and selling the same under the general designation of "Ford."

In order to reach the widest market plaintiff has developed a highly organized and extensive system of agencies under which it appoints in the states, counties, towns and villages throughout the United States and elsewhere, where its product is sold, certain individuals, firms and corporations to act as its agents, each in a defined territory carefully specified in the contract of agency.

On the appointment of such agents plaintiff enters into written contracts with them, carefully defining the duties and powers of such agents and restricting their authority within certain limits.

Plaintiff does not sell its automobiles to wholesalers, dealers or others, but, through its said agents, itself sells directly to the individual member of the community who buys for his own use.

The Ford is perhaps, the most widely known automobile in the United States and agency contracts with the plaintiff are eagerly sought because the agent thereby secures the representation of a product sure to sell and out of which the agent can earn a sure and fixed commission. The widespread demand for Fords and the ease with which they can be sold makes an agency so desirable that agents will submit and agree to conditions in the agency

contract, and accept burdens which perhaps they would be unwilling to accept with any other automobile on the market.

The defendants, V. W. Winchell and F. M. Hathaway, partners under the name of Eugene Ford Auto Company, were appointed as limited agents of the plaintiff, and the contract appears in full in the transcript of record, pages 45 to 74, inclusive, and it will not be necessary at this point to copy this contract in full; it, will, however, be proper to copy portions thereof which have particular bearing on the questions presented by this appeal.

“THIS AGREEMENT, made at Highland Park, Michigan, this 10th day of September, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Mich., hereinafter known as the first party, and Eugene Ford Auto Co., of Eugene, in the State of Oregon, hereinafter known as the second party, WITNESSETH:

“WHEREAS the first party is a manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

“WHEREAS the second party has applied to the first party to be agent in certain territory hereinafter described, for the sale of

said Ford automobiles and parts, and first party is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:

“NOW, THEREFORE, this witnesseth:
appointment as limited agent:

“(1) That first party hereby appoints second party its ‘Limited Agent’ with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party’s product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS.

“(2) That second party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

“AUTOS ON CONSIGNMENT.

“(3) That first party will consign its Ford automobiles to second party to be sold to users only, and not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

“TERRITORY.

“(4) The second party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely:

* * * * *

“DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS.

“(5) The sales of Ford automobiles to residents outside of second party's own territory is a serious trespass upon the rights and earnings of other Limited Agents and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, and therefore, for any and each violation of the same by the second party, second party hereby agrees to pay to the first party the sum of two hundred fifty dollars (\$250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe, for business done, to

second party. First party may also cancel this contract for any such violation.

“PRICES.

“(6) Second party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 (\$53.25) Dollars for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words “List Price” are used herein they mean the latest retail selling price established or fixed by the first party.

“CHANGES IN PRICES.

“(9) The first party may change the list prices of any of its products at any time it may choose, and second party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices, first party shall not be bound to make any allowance to second party in cases of automobiles shipped before such changes take effect, and the second party's commission on automobiles as yet unsold by him shall be the difference between

the 85 per cent (85%) advanced by him on such automobiles and the new selling price; provided, that in case of a reduction in price the first party will allow to second party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the second party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

“ADVANCES.

“(10) Second party shall advance in cash to first party eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles by first party to second party.

“FREIGHT.

“(11) Second party shall pay the freight from Detroit or branch factory and advance freight, if any, as the case may be, to second party's place of business.

“TITLE OF AUTOS.

“(12) First party shall retain all and complete title to each automobile until actual

bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

“LIEN FOR ADVANCES. INSURANCE.

“(13) Second party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and shall keep and maintain insurance so as to protect himself against loss.

“RETAIL BUYERS’ ORDERS.

“(14) Second party shall take from each proposed purchaser of a Ford automobile and immediately forward to first party, a written order duly signed by him, upon the regular blank ‘Retail Buyers’ Order,’ furnished by first party, without alterations or changes ex-

cept the filling in of blanks, and second party will make no arrangement for the sale of a Ford automobile without taking such written signed order.

“DEPOSIT ON AUTOS.

“(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with Retail Buyers' Order to the first party who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

“COMPANY MAY REJECT ORDERS.

“(16) The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

“WARRANTY.

“(18) Second party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyers’ Order and Bill of Sale in that behalf. Second party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party will contain the only warranties of parts or accessories made by first party.

“CLAIMS AGAINST CARRIERS.

“(20) In case of damage to automobiles by carriers in transit to second party, collections from the carrier shall be made in the name of the first party as the owner of such automobile—

* * * * *

KEEP PLACE OF BUSINESS.

“(21) That second party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Eugene for the purpose of conducting such Limited Agency business, and shall employ competent

and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall second party have any authority to render first party responsible for the rent, taxes, wages or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

“THEFT OR DAMAGE TO AUTOS. WILL
SELL ALL AUTOS. CLAIMS BY
THIRD PERSONS.

“(22) Second party shall safely keep and he hereby agrees to save first party harmless against them for damage of any kind to said Ford automobiles while in his possession under consignment and in consideration of his being granted this agency, he expressly agrees that he will bear all damage or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while in his possession, or while in transit from, first party to second party.

“REPAIRS, NUMBER PLATES, ETC.

“(25) Second party agrees that he will make repairs on all Ford automobiles in his

territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number, or other numbers or marks affixed to any Ford automobile, or suffer the same to be done, and that he will not materially change any automobile consigned to him by the first party.

"PATENTS.

"(27) First party owns, and the Ford automobiles are manufactured under, and embody the following letters patent of the United States, or some of them, namely: * * * *

"COMMISSIONS.

"(28) As second party's commission for making such sales of Ford automobiles, first party will, after payment by the purchaser, allow to second party (except in cases specified in sub-division nine hereof) fifteen per cent (15%) of such full advertised list price, and will allow to second party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

"ADDITIONAL COMMISSIONS.

"(29) First party agrees to allow and

pay to second party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than \$5,000.00, but when the second party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of \$5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: * * * * *

“PAYMENTS TO SUB-LIMITED AGENTS SECURED.

“(30) It is agreed that such added commissions shall not be paid to second party until the second party shall have furnished satisfactory evidence to first party that all commissions and added commissions due or owing or which may later become due or owing the Sub-Limited Agents under the second party have been fully paid, or until satisfactory arrangements are made with the first party to insure Sub-Limited Agents being paid the commissions which may be due or become due to them under their respective contracts.

'COMPANY MAY SELL DIRECT.

"(31) First party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of the automobile or automobiles so sold, after it shall have received the full purchase price in cash, to the second party, or if there shall be a Sub-Limited Agent in that special territory and locality where such sale is made, then such five per cent (5%) shall be paid to such Sub-Limited Agent. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor shall it apply to sales to or through Sub-Limited Agents, but only to those made by first party directly to purchasers domiciled or residing in said territory within the meaning of Sec. 4 of this agreement. First party shall not pay any commission to second party or his Sub-Limited Agents on any sales to residents outside second party's territory, even though delivery should be made within said territory to residents of such other territory.

"STOCK OF FORD PARTS.

"(32) Second party agrees that he will purchase from the first party on his own

account and carry on hand at second party's place of business aforesaid a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Thousand Dollars (\$2000.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as second party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford cars is often injured by the use therein of inferior parts not made or furnished by the Ford Motor Company, therefore, the second party also hereby agrees that all his purchases of parts of Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

"DEPOSITS.

"(40) As a guarantee of the full and faithful performance by the second party of all the terms and conditions of this agreement, the second party has deposited with the first party the sum of Eight Hundred Dollars (\$800.00) in cash, and it is agreed that the

first party may, at its option, apply any part or all of said amount towards the liquidation of any past due accounts owing by second party to first party, or any other legitimate claims arising from the second party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the second party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided, such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Second party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

"SUB-AGENCIES.

"(44) Second party shall appoint a Sub-Limited Agent or establish a properly equipped branch or garage for the sale and repair of Ford automobiles in every such city or town within the above described territory as shall at any time or from time to time be designated by first party, in order that first

party shall have adequate representation therein, and so that the public shall have at hand facilities for purchasing Ford automobiles, parts, repairs, accessories and supplies, and if second party fails to secure such Sub-Limited Agents, or establish branches as herein provided, then first party may do so, or first party may take such territory entirely away from second party, or first party may sell direct its automobiles, parts, accessories, etc., in such unoccupied territory, in any of which cases the second party shall not claim or be entitled to any commissions on business so handled.

“NO ASSIGNMENT.

“(47) The second party shall have no right to assign this contract, or any interest in the same, without the written consent of the first party.

“CANCELLATION.

“(48) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancel-

lation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the second party prior to the date when such cancellation takes effect.

“SALE OF AUTOS ON HAND AT TIME OF TERMINATION.

“(49) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the second party and he undertakes (for the purpose of winding up the affairs of his said Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of second party to make such sale there shall remain on hand any such automobiles unsold after three months

from date of such cancellation or expiration, then on request by second party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said second party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

“TERMINATION.

“(51) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract.”

Agents of the Ford Motor Company are required by their contracts not only to find purchasers for Ford automobiles but they are also required to maintain places of business and repair shops at which purchasers of Ford automobiles can obtain that class of service which the authorized agents of the Ford Motor Company are obligated by their

contracts to give, and which purchasers of Ford automobiles are entitled to receive. In other words, purchasers of Ford automobiles obtain by their purchase not merely the machine, but a connection with all the agents of the manufacturer wherever situated, which entitles them, as owners of Ford automobiles, to the benefits of Ford service. Such purchasers acquire the right to service provided for by the twenty-fifth (25) condition of the contract between the plaintiff and its agents, wherein it is provided that, "Third party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner."

The agent is further bound by his contract (Condition 21) to "maintain on his own account and at his own expense a place of business and properly equipped repair shop." He also agrees (Condition 31) to "carry on hand a stock of Ford parts."

When a person or corporation is appointed as a Ford agent and holds himself out to the public as such there follows a representation to the public that purchasers of Ford automobiles through such agent will receive not only the machine, but also the right to the class of service provided for.

Under such a contract the defendants, V. W. Winchell and F. M. Hathaway, under the name of the

Eugene Ford Auto Company, were appointed as agents of the Ford Motor Company for the sale of Ford cars and parts in the territory defined in the contract. Pursuant to the contract, a considerable number of automobiles were consigned to the said defendants, of which 37 were on hand and unsold at the time this action was commenced. It appears from the evidence that by its terms, this contract would have run to July 31st, 1916, but under the power reserved in the contract (paragraph 48, transcript of record, p. 72), the plaintiff exercised its right to cancel and annul the contract on or about the 26th day of May, 1916, and the contract terminated at that time, and said termination was rightful and within the rights and power of the plaintiff.

Upon the cancellation of the contract, plaintiff sought a return of the cars unsold and on hand, and not succeeding in obtaining the cars by other methods, brought this action of replevin, under which the marshal took possession of the cars which were subsequently delivered to the plaintiff. The defendants named have asserted that the contract referred to did not create a consignment, and the relationship between the plaintiff and said defendants was not that of principal and agent, but rather that of vendor and vendee, and in their answer they have asserted absolute title to the cars, and right to retain the same. Under the terms of the contract, if

the transaction was a consignment, said defendants would have been entitled to a lien upon the cars for the advances made by them under the terms of the contract (paragraph 13 of the contract, page 52, Transcript of Record). The said defendants in their answer (Transcript of Record, pages 10, 11, 12 and 13), claimed to be the absolute owners of the automobiles in question, which claim of ownership, of course, was inconsistent with the claim of a lien thereon as security for advances.

Defendants in their answer not only interposed a general denial to the allegation of the complaint, but asserted title in themselves to the property in dispute; in their third separate answer alleged a settlement; again in their fourth separate answer alleged ownership; and concluded with a prayer for the return of the automobiles taken under the replevin, or for their value, and for large damages by reason of the taking.

It is apparent from the record that this contention of defendants is based upon the claim that the contract between the plaintiff and the defendants, as its agents, was not what its language expressed, but that instead of a consignment to an agent, the actual transaction was a sale by the plaintiff to the defendants, with an attempt to control the prices and conditions of subsequent sales by the agents to the public in violation of the Act of Congress of July

2, 1890, known as the "Sherman Anti-Trust Act." It becomes necessary, therefore, to take this contract by its four corners and ascertain from the terms and provisions thereof whether the contract is what it purports to be—a contract for the purpose of appointing agents for the sale of automobiles, and providing for the consignment to such agents of automobiles for sale by the plaintiff through its agents to the public or whether the inference is justified that the contract of agency is not what it purports to be, but rather a mere subterfuge to conceal a sale for the purpose of enabling the manufacturer to control the prices at which dealers shall vend Ford automobiles to the general public.

It is the contention of the plaintiff not only that the contract is a bona fide contract of agency and consignment and to be interpreted according to the language used and the expressed intentions of the parties, but that the court is limited to the construction of the actual contract made rather than some other different contract which counsel may think, or claim or suggest as the real contract, made under cover of an agency contract, for the purpose of evading the Sherman law.

ASSIGNMENTS OF ERROR.

The Transcript of Record shows that appellant

has made 12 assignments of error, of which numbers 1, 2, 3, 4, 5, 10 and 11 relate to the error of the court in refusing or giving instructions to the jury, and the other assignments of error relate to erroneous rulings of the court in ruling upon the evidence in the case; in directing the verdict which the jury should bring in; in taking from the consideration of the jury questions upon which there was some evidence to go to the jury; and in refusing to instruct that the contract involved in the case was a consignment contract.

It is also the contention of the plaintiff that the Court erred in giving instructions and ruling upon the trial in a manner which led the jury to assume that they were to give to defendants damages for matters growing out of the cancellation of the contract, notwithstanding the Court's ruling that the plaintiff was entitled to cancel the contract at any time with or without cause.

The plaintiff does not waive any of its assignments of error, and each will be particularly discussed in the course of this argument.

The contract shown in the record is the basis of plaintiff's plan of marketing its product, and all questions in this case lead back to the contract itself, and upon its validity depends not only the right of plaintiff to maintain this particular action, but also

its right to do business as now organized under the plan of consigning goods to agents with limited authority to sell for it.

POINTS AND AUTHORITIES.

I.

The contract set out in the complaint creates an agency and results in a bailment to the agent, not a sale.

Strum v. Boker, 150 U. S. 323, 37 L. ed. 1093-9.

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C. A.)

Harris v. Coe, 71 Conn. 163, 41 Atl. 554.

II.

A manufacturer has the right to fix the prices at which its sales agent shall sell and the territory in which it may sell.

Virtue v. Creamery Package Mfg. Co. 227 U. S. 8, 57 L. ed. 393.

Waltham Watch Co. v. Keene, 202 Fed. 225, 240.

**Cole Motor Car Co. v. Hurst, 228 Fed. 280,
(C. C. A.)**

**Whitwell v. Continental Tobacco Co., 125 Fed.
454.**

III.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

**Cincinnati P. B. S. & P. Packet Co. v. Bay,
200 U. S. 184, 50 L. ed. 432.**

Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940.

IV.

Where the contract does not by its terms create a restraint of trade, some evidence of an unlawful intent becomes essential.

**Bigelow v. Calumet & Hecla Mining Co., 167
Fed. 728 (C. C. A.).**

**Cincinnati P. B. S. & P. Packet Co. v. Bay
200 U. S. 179-184, 50 L. ed. 428.**

V.

A patentee has an exclusive right to make or use

or sell the patented article or to permit to others those rights or any one or any part of them.

Paper Bag Patent Case, 210 U. S. 424, 52 L. ed. 1122.

Bement v. National Harrow Co. 186 U. S. 70, 46, L. ed. 1059.

VI.

Courts are unwilling to put limits on the exercise of the privileges granted to a patentee by law, recognizing that as a function of Congress.

The Button Fastener Case, 77 Fed. 288-294.

VII.

Even if the contract could be construed as effecting a sale to the agent, nevertheless such sale would be a sale subject to conditions and restrictions and the courts recognize the right of a patentee to attach conditions to a sale of the patented article.

Keeler v. Standard Folding Bed Co. 157 U. S. 657, 39 L. ed. 848.

Bement v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1059.

VIII.

Only a sale **without condition or restriction** will pass the patented article out from under the monopoly which the law secured to the patentee. This limitation is recognized in all the cases.

Henry v. Dick Co. 224 U. S. 1, 56 L. ed. 645.

Bement v. National Harrow Co. 186 U. S. 70.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339,
52 L. ed. 1086.

Dr. Miles Medical Co. v. John D. Park & Sons,
220 U. S. 373.

IX.

An agent or vendee of a patentee may, by direct covenant or agreement, be bound to the observance of price restrictions, imposed as a condition upon which right of sale is exercised.

National Phonograph Co. v. Schlegel, 128 Fed.
733.

**Rubber Tire Wheel Co. v. Milwaukee Rubber
Works Co.** 154 Fed. 359 (C. C. A.).

American Graphophone Co. v. Boston Store,
225 Fed. 785.

X.

Competition is not affected by a contract between a patentee and his agents whereby the sale price is fixed.

Blount Mnfg. Co. v. Yale & Towne Mnfg. Co.
166 Fed. 555.

Virtue v. Creamery Package Mnfg. Co. 227
U. S. 32, 57 L. ed. 393.

XI.

In all the cases is found a recognition of the distinction between the right of a patentee to fix prices by direct contract and the attempt to do so by mere notice affixed to the article.

Dr. Miles Medical Co. v. John D. Park & Sons,
220 U. S. 373.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 52
L. ed. 1086.

United States v. Keystone Watch Case Co.
218 Fed. 502.

"TRUST LAWS AND UNFAIR COMPETITION" (United States Government Printing Office in 1916), pp. 579-580, 592-593, 651-652.

XII.

But if we should concede the construction of the contract asserted, nevertheless there has been no restraint of trade as measured by the rule of reason.

Whitwell v. Continental Tobacco Co. 125 Fed. 454 (C. C. A.).

Phillips v. Iola Portland Cement Co. 125 Fed. 594-5 (C. C. A.).

Bigelow v. Calumet & Hecla Mining Co. 167 Fed. 704-712.

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C. C. A.).

O'Halloran v. American Sea Green Slate Co. 207 Fed. 187-190.

United States v. Hamburg-American S. S. Line, 216 Fed. 971-2-4.

United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243.

Nash v. United States, 229 U. S. 373, 57 L. ed. 1232.

XIII.

Where the defendants in an action of replevin deny the plaintiff's title **and** right of possession, and assert ownership in the defendants and right of possession, it is not necessary for the plaintiff to prove a demand prior to the institution of the action.

Brown v. Truax, 58 Or. 572-7.

XIV.

A claim of lien is inconsistent with a claim of ownership, and defendants in this case cannot rely upon a right of lien to retain possession of the property.

XV.

Where parties declare that a particular payment will not be accepted, without specific objection to the form in which the offer of payment is made, no questions can thereafter be raised as to the form of tender, nor is it necessary to renew or continue the tender.

XVI.

A tender or offer of payment is waived or be-

comes unnecessary when it is reasonably certain that the offer will be refused.

Hills v. Higgins, 105 U. S. 319, 126 L. Ed. 1052.

Whitney Company v. Smith, 63 Ore. 187, 146 Pac. 1000.

XVII.

It is error for the court to withdraw from the consideration of the jury a question upon which there is even a scintilla of evidence.

XVIII.

Where one party claims to have been damaged by the acts of another it is incumbent upon him to prove both the fact of damage, and the items making the amount thereof claimed.

ARGUMENT.

I.

While this action on its face is an action of replevin for the recovery of specific personal property and involves several questions peculiar to actions of that kind, yet there has been brought into question the system which plaintiff has developed and per-

fectured for the selling of automobiles manufactured by it, pursuant to which it appoints numerous agents and enters into contracts with them, similar in all respects to the contract between the plaintiff and the defendants, Eugene Ford Auto Company, set out in full in the record in this case. It is the contention of the plaintiff that this contract is only what it purports to be—a contract of agency and bailment between the plaintiff and its agents. We respectfully submit that the rulings of the District Court in this point in particular are contradictory, as we shall endeavor to show, and did not properly enlighten the jury as to the rules by which they should be guided in arriving at their verdict.

Inasmuch as the major portion of this brief will be taken up with the discussion of that contract, in view of the claim made that it is violative of the Sherman Anti-Trust Act, it is proper first to discuss and dispose of the other questions involved in this record. It is undisputed that a contract was made on the 10th day of September, 1915, between the plaintiff and Eugene Ford Auto Company, of which contract a copy appears in the transcript of record, beginning at page 45, and pursuant to that contract a large number of automobiles were consigned to the defendant, and 37 thereof were on hand at the time this action was begun. It is undisputed that pursuant to the 10th paragraph of the contract the defendants had advanced to the plaintiff 85 per cent

of the list price of the automobiles so consigned, and were entitled to a lien thereon for that 85 per cent, unless the same was waived or released by them, which lien is secured by the 13th paragraph of the contract. It is also probable, although the testimony is not clear on that point, that the defendants were complying with the 21st clause of the contract with reference to maintaining the place of business which the contract obligated them to maintain.

There was some testimony and some discussion with reference to the deposit provided for by the 40th paragraph of the contract (Transcript, page 66), but the court properly withdrew the same from the consideration of the jury for the reason that there was no issue with reference thereto in the pleadings. The same applies also to the withdrawal by the court from the consideration of the jury of any question arising under the 29th paragraph of the contract (Transcript, page 61).

It is also beyond dispute that pursuant to paragraph 48 of the contract (Transcript, page 72), the plaintiff cancelled the contract by notice to the defendant given by telegram on the 24th day of May, 1916, and by letter on the 25th day of May, 1916, and that both letter and telegram were received in due course by the defendants. There can be no question but that the plaintiff was strictly within its rights in thus cancelling the contract, and that it was not

obliged to give any reason for cancelling, and the court so instructed the jury:

“Now, the contract as entered into between the plaintiffs, the Ford Motor Company, and the defendants, as I said, was dated September 10th, 1915. It expired by limitation on the 31st day of July, 1916, but it contained a provision that either party to the contract might revoke or cancel it at any time without cause—without giving any reason for it, and it appears in testimony that the Ford Motor Company, exercising the right given by this contract, did in fact cancel it * * * prior to the time this action was instituted.” (Transcript of Record, p. 115.)

It being plain that the cancellation was plaintiff's right, no inference of malice could be drawn from the fact of cancellation.

II.

ERRORS OF THE COURT IN INSTRUCTIONS RELATIVE TO DAMAGES.

THE VERDICT FOR DAMAGES NOT SUP- PORTED BY EVIDENCE.

Paragraphs 49 (Transcript, page 72) and 51 (Transcript, page 73) provide as to the rights and

obligations of the parties in the event of a cancellation, and these provisions become of special importance by reason of certain instructions of the court which we have assigned as error. Paragraph 49 provides that in case of cancellation or expiration the Ford Motor Company may at its option retake possession of all automobiles on hand on consignment unsold at the date of cancellation or expiration, and return to the agent the advancements on account of such automobiles, or at the option of the Ford Motor Company the agent may be required, and he agrees, to endeavor to sell such automobiles as he may have on hand unsold notwithstanding the cancellation of the contract, subject to the terms of the contract relating to sales, but the right to make such sales, and as a result thereof to make the profits provided for in the contract itself in the event of sales, only exists in the event that the Ford Motor Company exercised the option to require the agent to continue efforts to sell, and did not exercise the option to retake possession of the machines. Unless the Ford Motor Company elected to require the agents to sell, they could have no right in any event or under any circumstances to count upon any more commissions, and the agents' only right to, or in connection with, said automobiles would be to retain possession thereof by reason of the lien created by the 13th paragraph of the contract until that lien should be satisfied, or the same waived by the conduct of the agents.

When the Ford Motor Company gave to the Eugene Ford Auto Company notice of cancellation by its telegram of May 24th and its letter of May 25th, 1916, the Eugene Ford Auto Company ceased to have any right to sell, or to do anything except hold a lien for their advances. The contract had been terminated, and the subsequent relations of the parties are carefully provided for by paragraphs 49 and 51 of the contract. It would seem then to be perfectly clear that the court was in error in instructing the jury that they might take into consideration in arriving at their estimate of the damages suffered by the defendants, the profits which the defendants might have earned by the sale of the automobiles replevined, and the verdict was wrongful because based upon such estimate of profits. This conclusion is emphasized by the provision of paragraph 51, where it says that "Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party, shall, except as to matters pending at the date of such termination, cease and determine, and **the second party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the second party shall have dealt during the currency of this contract.**" This gives double assurance to the clear conclusion that the agents could not claim any commissions after the cancellation of the contract, unless the Ford Motor Company exercised the option

secured to it to require the agents to sell the automobiles on hand notwithstanding such cancellation.

The court in instructing the jury (Transcript, page 106), gave the following instruction, which we think was of itself error requiring the reversal of this case:

“Now, in estimating the damages you should keep in mind the amount that you allow as the value of these cars. The taking of the cars away from the defendants, of course, deprived them of the right to sell them and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case, but if you allow that on the value of the cars, that is, if you find that the value of the cars is the amount that is claimed by the defendants, which is the wholesale price with the 15 per cent added, or the profits that the defendants would have made if they had sold the cars, then you should not allow that same profit in estimating the damages. In other words, you should be careful not to allow the same item twice in the item of damages.”

This instruction permitted the jury to take into consideration profits which might have been earned if there had been no cancellation, but profits to which defendants were in no way entitled after the cancellation. These profits are figured up in the sum of \$2477.75, and aside from some testimony that the profits from the garage operated by the defendants amounted to approximately \$300.00 a month, there was no other evidence of damages offered in this case.

The action was begun on the 29th day of May, 1916, and the judgment was entered on the 11th day of September, 1916, and at the rate of \$300.00 a month, the maximum figure testified to by the defendants, the damages resulting from this source could not have exceeded \$1030.00. We challenge counsel to show any other items of damage supported by any evidence in this case. It is alleged in their answer that "the business of these defendants has been destroyed, their business credit ruined, their standing in the mercantile world has been discredited, and they have been injured and damaged by the malicious acts of defendants, as alleged, to the sum of \$25,000.00." In addition to the value of the automobiles replevined. There is not a scintilla of evidence to be found in the record showing any malice on the part of plaintiff, or showing, or tending to show, that the defendants' "standing in the mercantile world has been discredited" or "that their

business credit has been ruined," and so far as concerns the allegation that "the business of these defendants has been destroyed," it appears from the evidence that they entered into a contract with Vick Brothers **prior to the commencement** of the replevin proceedings to sell out for a sum less than \$2,000.00 (Transcript, p. 258).

It clearly appears that the sale to Vick Brothers was a result of the cancellation of the contract and not of the replevin, and was actually agreed to prior to the beginning of the replevin proceedings.

The cancellation being rightful no claim for damages could be founded on it.

"Q. Now, when the Ford Motor Company took possession of these cars under the writ of replevin, that was after you had agreed to, or had a tentative agreement to sell out the other business to Vick Brothers?

A. Yes, sir." (Transcript, pp. 94-95.)

"COURT: Was your transaction with Vick Brothers prior to the time the cars were replevined?

A. Yes, it was, the time that we negotiated—that is, began to talk to Mr. Goden; he seemed so positive that the deal would go

through just as he stated, that we immediately began afterwards to invoice, before he came back from Portland.

COURT: When was it that Vick Brothers paid you the thousand dollars?

A. That was after the invoice.

COURT: Before or after the time that the United States Marshal took possession?

A. That was before the time." (Transcript, p. 103.)

"COURT: Then how do I understand that you base your claim that the replevining of these cars destroyed the garage business? You understand this contract only had two months to run, and in any event at the end of that time the company would have been under no obligations to sell you cars.

A. Well, you see, Vick Brothers had a deposit on our business and they had us tied up, you see, in a way.

COURT: On what part of your business?

A. On the garage end—accessories and parts.

COURT: That is because of their contract or agreement with you?

A. Yes, sir.

COURT: Your idea is then that the failure of the Motor Car Company, if I understand you correctly—the failure of the Ford Motor Company to carry out the preliminary agreement that you had with Mr. Goden was really the cause of your trouble?

A. Ye, sir.

COURT: That is the idea?

A. Yes, sir.” (Transcript, pp. 104-105.)

By the certificate of the court which may be found in the transcript beginning with the last line of page 105, it appears that all the evidence to establish damage to defendants' business is to be found on pages 89 to 105, inclusive. This evidence covers the loss of profits on sales, to which defendants were not entitled, as we have shown; the deposit money and bonus money matters, which the court expressly withdrew from the consideration of the jury (Transcript, p. 314); and the profits of operation of a garage (p. 92); these last profits cannot be a basis of damages because they were cut out of consideration by the sale to Vick Brothers, which admittedly was prior to the replevin.

The court instructed the jury (Transcript, p. 311) that:

“That is a question of fact for you to determine **from the testimony** what damages, if any, the defendants suffered; what was the damage to the defendants’ business by reason of the fact that the plaintiff wrongfully took from their business these thirty-seven cars.”

We, therefore, submit that not only was the verdict for \$6,000 special damages not based upon any evidence in this record, and clearly and only an arbitrary award given in clear disregard of the court’s specific instruction that the jury should not allow punitive damages, but, insofar as there is any basis on testimony actually received, the jury was erroneously instructed when they were allowed to include the profits which the defendants might have made had they been permitted to sell these cars, or the profit in operating the garage and business sold to Vick Brothers before the replevin case was filed.

III.

It is worth while to review the transactions under consideration in their chronological order—

(a) The Ford Motor Company cancelled the contract with the Eugene Ford Auto Company May 24th or 25th, 1916. This cancella-

tion was within its rights and though it may have resulted in a loss to defendants of anticipated profits was not the basis of any legal complaint.

(b) The Ford Motor Company notified defendants that it proposed to set up Vick Brothers as its agents at Eugene in the place of the defendants. This it had a right to do and defendants could have on valid objection thereto.

(c) At the same time the Ford Motor Company notified defendants that "the territory and your stock will be taken over by Vick Brothers, who will open a branch at Eugene." As to the territory and the Ford cars that was within the Ford Company's rights under the contract. As to other stock Vick Brothers couldn't take that unless defendants agreed.

(d) But be that as it may, defendants did agree, and a contract was made by defendants with Vick Brothers by which they sold out to Vick Brothers, and this was a result of the cancellation and prior to the replevin.

The evidence above quoted from pages 104 and 105 of the transcript demonstrate by the testimony of the defendants themselves that their changed po-

sition and whatever resulted therefrom was fixed prior to the filing of the replevin case.

It will be noted in the testimony just referred to that Hathaway, a member of the Eugene Ford Auto Company, plainly testified that "The failure of the Ford Motor Company to carry out the preliminary agreement * . * * was really the cause of the trouble."

Needless to say, that this is not an action to recover damages based on that preliminary contract. Whatever damages, if any, resulted from any failure by anyone to carry out that agreement are another story.

The court ruled (Transcript, p. 315) that the Ford Motor Company was not a party to the contract between the defendants and Vick Brothers. The defendants, the Eugene Ford Auto Company, sold out their business to Vick Brothers because of the cancellation of the agency contract, and thereafter were only interested in receiving the other half or less than half of the sale price. They clearly did not think it worth while to carry on business without the Ford Agency. Thereafter the defendants for some reason, probably because they could not agree with the Ford Motor Company as to the sums to be paid defendants by plaintiff, endeavored to back out of their contract with Vick Brothers, although one thousand dollars had been paid on account thereof,

and the taking of inventory was completed and Vick Brothers given possession. The controversy with Vick Brothers is apparently still pending and is the real source of defendants' grief. Of this situation, Hathaway, one of the defendants, testified (Transcript, p. 266):

"A. I would answer it in this way: That the Ford Motor Company stopped us from carrying out our deal with Vick Brothers, and, of course, we interfered with having Vick Brothers come in and take that proposition at all until this other was settled, and I guess we interfered enough that it caused Vick Brothers and Summons to bring an action against us. Well, of course, we had to answer in that action." (Transcript, pp. 266-7.)

How the Ford Company "stopped" them "from carrying out our deal with Vick Brothers" appears in the answer made by these defendants in the action brought by Vick Brothers. No mention is there made of the replevin proceedings and for the purposes of this case, it is enough to say that the court ruled (Transcript, p. 315) that there was no such contract as alleged in said answer made on the part of the Ford Company.

"COURT: I might call the jury's attention to that, although I think it is not very

material. It seems Mr. Goden's interviews with these defendants, the first one he had, was a tentative interview, and he was required to report to his principal for instructions. He had no authority to bind the plaintiff by any contract because he was required to report to his principal and get instructions, therefore, there was no contract binding on the 29th day of May, 1914, because he had no authority to make such a contract.

The most that can be said is that defendants were hasty in entering into their contract with Vick Brothers. But it was that contract that put defendants out of business, and not the subsequent replevin, and everything on which defendants attempted to offer proof of damages resulted from that contract and not from the replevin, or from the cancellation of the agency contract which cancellation was rightful.

“Again, in estimating the amount of damages to which the defendants are entitled, if any, you should bear in mind the fact that this contract had in fact been **legally cancelled prior to the time** the plaintiff took possession of these cars.” (Charge to the jury, Transcript, p. 312.)

IV.

THE QUESTION OF TENDER.

There are certain other assignments of error which it is proper to take up at this time. The first assignment of error (transcript p. 33) is based upon the fact that under the terms of the agency contract, when the Ford Motor Company cancelled the contract and exercised its option to retake possession of cars remaining unsold in the hands of an agent, the contract provided that it should return to the agent the advances made by the agent to the Ford Motor Company, in accordance with the 10th paragraph of the contract, for which the agent had a lien in accordance with the 13th paragraph of the contract. The rule undoubtedly is that when the owner of property proposes to exercise the right to retake the property which the defendant is entitled to withhold in its possession as security for money, it is necessary for the moving party to pay or tender the payment of the sums due. It was with this rule in mind undoubtedly that the court gave the instruction objected to in the first assignment of error. The court instructed the jury in part as follows: "So that the plaintiff would have been entitled to the possession of these cars if it had paid to the defendants \$16,077.50, but the evidence shows that it did not make such payment, nor did it tender to the defendants this amount, or any

other amount on these cars, and, therefore, it is not entitled to the possession of the cars at the time this action was brought."

This instruction, as we propose to show, was erroneous both because it ignored the issues made by the pleading, and also because it took away from the consideration of the jury an issue upon which there was some evidence on which the plaintiff was entitled to go to the jury. It is proper to consider in connection with this erroneous instruction the refusal of the court to give the instruction mentioned in the second assignment of error, which was plaintiff's requested instruction No. 4:

"I instruct you that payment to defendants of advancements on said automobiles by defendants before taking possession of the same, by the plaintiff, was not necessary if the defendants informed plaintiff or led plaintiff to believe, they would not accept said payment." (Transcript pp. 34-35, 117.)

Had the defendants in their answer not disputed plaintiff's title, but contented themselves with asserting a lien for their advancements, it would unquestionably have been necessary for the plaintiff to have proved a payment or tender of the amount of their advances unless defendants by some act on their part led plaintiff to believe that payment would not be accepted.

The answer in this case, after denying every allegation of the complaint, alleges (transcript p. 10) "that the defendants prior to the time of the commencement of this action had purchased all the Ford automobiles described in said complaint, and had paid the plaintiff the full purchase price required to be paid from them to plaintiff. * * * and title to the same passed from plaintiff to defendants, and defendants **became the owners** thereof, and prior to the time of the commencement of this action, and at the time of the commencement thereof were, and now are, **the owners thereof**, and entitled to the exclusive and immediate possession of the automobiles."

And again in their further and separate answer and defense, page 11 of the transcript, it is alleged "defendants were and are the **exclusive owners** of said automobiles, and each one of the same, and entitled to the **exclusive and immediate possession** thereof, and were in the lawful possession thereof at the time of the commencement of this action."

And again in the third further and separate answer and defense it is alleged—"That prior to the commencement of this action and on or about the 29th day of May, 1916, the plaintiff and the defendants V. W. Winchell and F. M. Hathaway had a settlement of the contract existing between plaintiff and defendants wherein and whereby the plain-

tiff and defendants adjusted their mutual accounts and reciprocal claims, and wherein and whereby the plaintiff agreed that the defendants were the owners of and did convey to defendants, V. W. Winchell and F. M. Hathaway, all claims of title on the part of plaintiff to the automobiles described in the complaint and each and every one thereof, and relinquished every claim of possession to the said automobiles and each and every one thereof." (Transcript pp 11-12.)

And again in the fourth separate answer and defense it is alleged: "That at the time of the commencement of this action these defendants were, and are now, **the owners** of the Ford automobiles mentioned in the complaint." (Transcript p. 12.)

No party can have a lien upon his own property for the lesser interest evidenced by lien is merged and swallowed up in the greater right of ownership. By asserting absolute ownership thus repeatedly and positively the defendants waived their right under the contract to hold a lien upon the property replevined, and the issue became one of claim of ownership on the part of the plaintiff and the denial thereof and assertion of title by the defendant. Under these circumstances, it is perfectly apparent that the defendants made it clear to the plaintiff that they would not accept the pay-

ment if it was offered, and requested instruction No. 4 above quoted should have been given.

The case of **Hills vs. Higgins**, 105 U. S. 319, 26 L. ed. 1052, is instructive. That was a suit for an injunction to restrain the collection of a tax alleged to be void because the assessor had not allowed to the tax payer a deduction from the assessed value of the property because of debts, as provided by the statute. The defense was made that the plaintiff was not entitled to the injunction because there had been no affidavit made, or proper demand for deduction. The court said:

“A more difficult question is presented in regard to those who made no affidavit or demand for deduction, but who have shown that they would have been entitled to deduction if the demand had been properly made. That question is, whether the fact clearly established that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused; that payment or performance will not be accepted.

Such is the doctrine established by this court in repeated decisions in regard to another branch of law concerning the collection of taxes. *Bennett v. Hunter*, 9. Wall., 326 (76 U. S., XIX 672); *Tracey v. Irwin*, 18 Wall., 549 (85 U. S. XXI, 786); *Atwood v. Weems*, 99 U. S. 183 (XXV, 471)."

The Supreme Court of the State of Oregon in *Whitney Company v. Smith*, 63 Or. 187, 126 Pac. 1000, which was a suit for specific performance, said:

"The defendant now urges that this testimony was not only hearsay, but that is failed to show that the plaintiff offered performance prior to the commencement of the suit. We think, however, the objection is not available for the benefit of the defendant, because, as he admits having denied the contract, which is virtually a disavowal of any liability thereunder, the law **does not require the plaintiff to do the vain thing of tendering payment** to a man who refuses in advance to be bound by any provision of the contract. In our judgment, under such circumstances, proof of a tender was unnecessary."

We, therefore, submit that as a proposition of law on the pleadings the court was in error in in-

structing the jury that a tender was necessary before the plaintiff could retake the property, but we submit further that the instruction given was erroneous for another reason—in that it assumes and instructs the jury that there was no evidence of tender when it clearly appears that there was in the record sufficient evidence to require the submission of that question to the jury. It should be borne in mind that the rule is well established that it is not necessary to produce the actual gold coin in hand and clink it in the hearing of the person to whom a tender is due to constitute a sufficient tender in the absence of any objection based on the failure to produce the actual money. If the objection is solely to the amount tendered, or it is stated positively that payment which it is proposed to make will be refused, no question can afterwards be raised as to the failure to produce the coin.

To demonstrate the error of the court in instructing the jury that plaintiff “did not tender to the defendants this amount, or any other amount on these cars,” it is only necessary to quote some of the testimony in the transcript:

Mr. Goden, a witness for plaintiff, testified:

“Now, I have the money in the bank to pay you for those automobiles you have in your possession,” and Mr. Winchell said, “You mean cash,” and I said,

"Yes, I have got the cash." He says, "I won't do anything without I get cash from the Ford Motor Company." I said, "All right, the cash is in the bank. I can't get it tonight, but will get it in the morning." He says, "You mean you can get it in the morning? It is there?" I said, "Yes, it is there."

Q. Was there anything said there at that time by Mr. Hardy or anyone else with reference to whether or not they understood this to be a tender?

A. Yes, I took it up with that action, that I was tendering them the money. * * *

A. I said, "I am here for the purpose of making a tender to you of this money for these automobiles according to the contract." And then he spoke up and said, "Well, we will take that under advisement."

Q. Did you the next day make any attempt in any way to tender this money again?

A. Not excepting meeting, I believe it was Mr. Winchell on the street, and telling him the money was ready for them if they wanted it. (Transcript pp. 80-81-82.)

And one of the defendants, F. M. Hathaway, testified as follows:

A. Well, he said that could be taken care of afterwards. He says, "I can't say, you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that we were entitled to our bonus money and also to our deposit, and he said, well, he says, "I am only authorized to pay you the 85 per cent," and he says, "I have the authority, or have the money at the First National Bank, and can make you a check tomorrow morning."

Note the language of the defendant where it said "Well, we told him that we couldn't consider a proposition of that kind." Here in this quotation and in the testimony from which it is taken is a positive refusal to accept the 85 per cent unless other sums reasonably in question were paid at the same time.

Again on pages 268 and 269, transcript of record, we find further evidence by one of the defendants himself of a tender and a positive refusal:

Q. And what did he say they would do?

A. They would pay us the 85 per cent of the

selling price or list price of the Ford cars—these cars that were in question.

COURT: That is, they would return to you the money you had paid on the cars—was that it?

A. Yes, sir.

Q. And you refused to accept that?

A. Yes, sir.

We submit that the court must have forgotten this evidence when he instructed the jury that the defendants were entitled to the return of the property because there had been no tender of the amount of the advancements.

V.

QUESTION OF DEMAND FOR POSSESSION BEFORE BEGINNING REPLEVIN.

It was claimed by the defendants in the trial of this case, and apparently assumed by the court, that the defendants were entitled to a verdict for the return of the property for the reason that, and because it appeared in the evidence that there was no demand made by the plaintiff, or in its behalf, for the return of the property before the beginning of replevin proceedings.

That the question was brought to the attention of the court appears from the exception by the plaintiff to the actions of the court in directing the verdict in favor of the defendants, it appearing in the transcript (p. 116) that "the plaintiff duly excepted upon the ground that under the pleadings in this case a demand was unnecessary." The position of counsel for the defendant is stated in the first paragraph of page 114 of the transcript:

* * * "and, as counsel has suggested, if their contract is valid, we were lawfully in possession of these machines, even if they owned them—we had acquired them lawfully and had a lien for 85 per cent on advances, and they didn't extinguish that lien and didn't make a demand, and the rule is absolute when a person can replevin personal property, even though it belongs to another, demand must be made for the return or the action for replevin will not lie."

The defendants (transcript p. 111) moved the court to instruct the jury that plaintiff had no cause to submit to them, and as the second ground therefor (transcript p 301) stated "Second, that the plaintiff had proved no demand before entering this action." And again top of page 304,—“and the rule is absolute when a person can replevin personal property even though it belongs to another, demand

must be made for the return or the action for replevin will not lie."

The court granted the motion to instruct the jury that the plaintiff had no case to submit to them, and held that the defendants were entitled to a ruling instructing the jury to return a verdict in their favor. Thereupon, the following proceedings were had:

MR. McDOUGAL: May we have an exception to the court's ruling on the motion to take from the jury the question of whether or not demand was made upon the defendants and a proper tender made to the defendants before the institution of the action?

COURT: Yes.

From this quotation and discussion of the record it is apparent that the court ruled that the plaintiff was obligated to prove a demand for the return of the property before instituting an action of replevin, and as it had not proven such demand it could not recover. This we respectfully submit constitutes error necessitating a reversal of this case. Whatever may be the law in other states, it is the settled law in the state of Oregon where this action arose, that where defendant in his answer claims the title to the property in question and the right of possession, no proof of demand for

the return of the property by the plaintiff is necessary. The answer of the defendants in this cause is an unequivocal assertion of title in themselves with the right to possession.

The Supreme Court of Oregon has said, **Brown v. Truax**, 58 Or. 572-577:

“It is also claimed that plaintiff cannot recover in this action by reason of having failed to allege and prove demand upon defendant for the property.

“Moreover, the defendant in his answer claims the title to the property, and, where such is the condition of the pleadings, no proof of demand is necessary. *Smith & Co. v. McLean*, 24 Iowa, 322; *Homan v. Laboo*, 1 Neb. 204; *Shoemaker, Miller & Co. v. Simpson*, 16 Kan. 43.”

VI.

THE CONTRACT.

The 10th and 11th assignments of error lead up to the consideration of the agency contract in evidence in this cause, and a discussion of that contract is also a discussion of these assignments. It is a little difficult from the record to determine

CLAIM OF TITLE AND RIGHT OF POSSESSION BY DEFENDANT.

Where in replevin defendant claims title to the property and the right of possession incident thereto, no demand by plaintiff is necessary, although defendant may honestly believe that his claim is legal and just. So, if on the trial defendant contests the case upon the merits, basing his defense upon title in himself and the right of possession incident thereto, it is not necessary for plaintiff to prove a demand, nor in such case can defendant defeat the action on the ground that no demand was in fact made, although the case is one where a demand should have been made, since defendant's position on the trial is inconsistent with any supposition that he would have restored the property if a demand had been made. The rule that a demand is unnecessary where defendant contests the case upon the merits does not, however, apply to cases where a demand is necessary not merely as a basis for asserting the remedy, but to vest in plaintiff a right of possession, as where such right depends upon a condition which is broken only by a demand and refusal.

WHERE DEMAND WOULD HAVE BEEN UNAVAILING. No demand is necessary where it appears from the facts and circumstances of the case that a demand if made would have been futile and unavailing, and this fact may appear either from the acts or declarations of defendant in regard to the property before the action is instituted, or from the property before the action is instituted, or from the position taken by him upon the trial, as where he does not rely upon the want of a demand as a technical defense but contests the right of plaintiff upon the merits, claiming a superior right or title in himself.

WAIVER OF DEMAND. In cases where a demand is necessary in replevin it may be waived by defendant, or he may by contesting the case upon the merits and claiming title to himself be precluded from relying upon the absence of a demand as a defense to the action, but a refusal to comply with a demand made after the suit is begun and the writ issued will not prevent defendant from relying upon the defense that no demand was made before suit, and a mere denial of plaintiff's right to possession is not a plea of property in defendant and does not waive a demand where a demand is necessary to entitle plaintiff to recover.

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contract is also a discussion of these assignments.
It is a little difficult from the record to determine

just how the court did rule upon the contract on the question of its validity or invalidity when attacked by the Sherman Anti-trust law. The court ruled clearly and unequivocally (transcript p. 310, 312, 314) that under the contract the plaintiff is entitled to cancel the contract and retake the property by the payment of advances. This, of course, assumes the validity of the contract, but the court without stating the grounds of its action, granted the defendant's motion to take the plaintiff's case from the jury, and as that motion was based upon the claim that the contract was in violation of the Sherman Anti-trust Law, it becomes incumbent upon us to discuss in full the contract, notwithstanding the fact that it appears that the trial court did not expressly rule as to the validity of the contract, but on the contrary (transcript p. 304) ruled—"As I interpret this contract, for the purposes of this case it is immaterial whether these cars were held by the defendants under consignment or as a sale." If the contract was valid, it must have been a consignment, and if invalid defendants claim it is a sale. The court based its ruling as to the immateriality of the contract, as has been said, on the absence of the demand and tender of repayment of the advances. As it is quite possible for this court to take a different view as to the materiality of the contract it becomes our duty to discuss it. We should preface our discussion, however, by calling attention to the fact that

not a particle of evidence was introduced to show invalidity, but the counsel for the defendants content themselves with asserting that upon its face the contract is in violation of the Sherman Anti-Trust Law. On the face of the record in this case, and without going outside that record, all there is before the court is an action of replevin to recover the possession of property consigned by plaintiff to defendants under the contract set out in full in the record, with the denial on the part of the defendants of plaintiff's right and assertion of title and ownership of the defendants.

It becomes, therefore, necessary at this time to take this contract **by its four corners**, and ascertain **from the terms and provisions thereof**, there being **no other source** from which light can be obtained, whether the contract is what it purports to be—a contract for the purpose of appointing an agent, and providing for the consignment to such agent of automobiles for sale by the plaintiff through its agent to the public, or whether the court is justified in this state of the record in inferring that the contract is not what it purports to be, but something else, and a mere subterfuge to conceal a sale for the purpose of enabling a manufacturer to violate the Sherman Law. It is the contention of the plaintiff not only that the contract is a bona fide contract of agency and consignment, and to be interpreted according to the language and intentions

of the parties as expressed by their language, but that the court is limited to the consideration and construction of the actual contract made, and cannot consider some other different contract which counsel may think, or claim, or suggest as the real contract made under cover of an agency contract for the purpose of evading the law. The contract shown in the record is the basis of plaintiff's plan of marketing its manufactured product, and all questions as to whether the transaction constituted a consignment or a sale lead up to the contract, and upon its validity depends the right of plaintiff to do business as now organized under the plan of consigning goods to agents with limited authority to sell for it. It will also be claimed that even if the agency contract should be construed as a sale to the agent nevertheless it must be held to be a sale subject to restrictions lawfully imposed by the plaintiff:

It is the contention of the plaintiff that this contract is only what it purports to be—a contract of agency and bailment between the plaintiff and its agent. It is the result of the contention made by the defendants that instead of a consignment by the plaintiff to its agent, there was a sale whereby the absolute and unconditional property in the automobiles passed from the plaintiff to the agent, and that the automobiles thereby became the agent's automobiles to do with as he chose, notwithstanding

the existence of the contract. This is the necessary effect of the defendant's claim of ownership, since it is admitted that the automobiles came into defendant's possession by reason of the contract shown in the record. Disregarding the fact that the contract between the plaintiff and the agent is clear and definite in all its terms, and precise in its use of language, nevertheless it is claimed that the language used is but a cover for the ulterior purpose of evading the law against combinations and restraint of trade. From the premise that the transaction was a sale, thus assumed, the conclusion is drawn that the transaction, or series of transactions, carried on under such agency contracts are in restraint of trade, and in violation of the Sherman Law. We believe it is capable of demonstration that the transaction was only what it purports to be—a contract of agency and bailment between the plaintiff and its agent, and that, therefore, the Sherman Law has no application to transactions under such contract, but further that the negative argument thus imposed upon us in a violation of the rule that a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts, and that it was incumbent upon our opponents to demonstrate in some way, and offer some facts to support the claim that the transaction was actually a sale under cover of an agency contract, and we contend further that even if it should be

held that the net result of the transaction between the plaintiff and its agent was a sale by the plaintiff to the agent of the automobiles manufactured by the plaintiff, nevertheless the transaction was not obnoxious to the Sherman Law, as interpreted by the Supreme Court.

It is the position of the plaintiff that the agency contract under which it consigns automobiles to its agents creates a contract of bailment between plaintiff and its agents, and that thereunder the automobiles remain the property of the plaintiff until sales have been arranged by the agent on behalf of the plaintiff under the terms of the contract itself, and upon conditions specifically set forth.

VII.

THE CONTRACT ITSELF.

We rely upon the provisions of the contract itself as demonstrating that a bailment is the relationship created by the contract between the plaintiff and its agent. The preamble states:

“Whereas, the second party has applied to the first party to be the agent in certain territory hereinafter described for the sale of said automobiles and parts, and the first party is willing to appoint second party with

certain limited authority upon the following terms and conditions only."

Thereupon follow paragraphs appointing the agent:

(1) "With certain authority as here expressly stated only, for the purpose of negotiating sales of the first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

(2) "That the third party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

(3) "That first party will consign its Ford automobiles to the third party through the second party to be sold to users only, and not for resale, upon bills of sale to be executed by the first party only, as hereinafter provided."

The next paragraph limits the territory in which the agent may sell, and there follows a statement of agreed damages and penalties for any violation of the territorial restriction.

It is further provided that the agent will arrange for sales of Ford automobiles to users at the

first party's full advertised list prices only, and the right is reserved by the plaintiff to change the list prices of any of its products at any time it may choose, and the duty is imposed upon the agent to conform to such changes immediately upon receiving notice thereof.

The tenth condition of the contract is presumably the basis of the inference that the contract constitutes a sale only, and that all the other provisions thereof are subterfuges to conceal the sale.

(10) "Third party shall advance in cash to second party or first party, as the case may be, 85 per cent of the full advertised list price at the time of its consignment of automobiles to third party."

The next condition provides that the agent shall pay all freight from the factory to the agent's place of business, but the 13th condition provides that the agent shall have a lien on each automobile for the 85 per cent advances by him and for the freight paid by him, and he is required to maintain insurance to protect himself against loss.

The 12th condition of the contract provides that the plaintiff shall retain complete title to each automobile until actual bill of sale signed and executed by it has been delivered to the vendee secured by the agent, and that such vendee must be one who

has purchased for use, at full list price plus freight and delivery charges, and that any attempt to sell or dispose, or deliver any Ford automobiles at less than such price, should be utterly void and pass no title.

Condition 14 of the contract requires that the agent shall take from proposed buyers a signed order to be transmitted to the plaintiff, which reserves the right to accept or reject the same for any reason satisfactory to it. (Condition 16.)

It will be noted in the clauses thus stated that by the contract the agent has no authority except that expressly conferred and that the agent receives a consignment of automobiles which are to be sold by the plaintiff, not the agent, upon bills of sale executed by the plaintiff, and the contract expressly provides that the duties of the agent are to arrange for sales of automobiles, retaining in the hands of the plaintiff the power to sell or refuse to sell, and to change the prices of its product at any time it may choose.

The fact that an agent, desiring to obtain the agency for the handling of Ford automobiles, is willing to and does agree to onerous conditions, does not justify an inference that the cash advanced by him pursuant to the contract was not actually an advance, but a payment, whereby the title

passed and the agent became the actual owner of the automobiles consigned.

It has always been a rule of law that contracts are construed to mean what they say. If the language used is simple, and the intention expressed is clear, then such contracts are enforced as expressed, if no violation of the law is thereby accomplished. Applying these rules, there can be no question but that the plaintiff clearly and effectually retained title to consignments of automobiles to the agent until all the conditions of the contract were fully complied with. It is violative of the language of the contract, and it is an inference from nothing contained in the record, to assume that the advance of 85 per cent, provided for in the contract, was not what the parties contracted it to be, but a payment of the full purchase price, resulting in a sale. Why should the agent contract, as in Condition 13, for a lien for his 85 per cent advance if by the transaction he became the owner of the automobile? The owner of property cannot, and need not for any advantage to himself, have a lien upon his own property, and the agent in the contract under consideration expressly accepted a lien on the automobile for his 85 per cent advance, and thereby expressly waived any claim to be the owner thereof.

A reading of the contract will disclose further

conditions which negative the contention that the agent became the owner of the automobiles, and not a word anywhere in the contract, directly or by logical inference, from which the affirmative of that proposition can be even inferred.

Condition 19 provides that the agent shall have no authority to warrant any of the automobiles, although warranty is an incident of ownership, and Condition 21 provides that in case of damage to automobiles by carriers in transit to the agent, collection from the carrier shall be made in the name of the plaintiff as the owner of such automobiles, thus affording another conclusive indication of ownership in plaintiff.

By contrast, Condition 31 shows the careful choice of language by the parties to this contract. Automobiles could come into the agent's hands by consignment only, but parts he was required by this paragraph of the contract to **purchase** and carry on hand.

Condition 47 of the contract contains another, and also a conclusive demonstration of the proposition that the contract was a true consignment and not a sale, wherein it is provided that in event of cancellation or expiration of the contract, first party to the contract (the plaintiff), "may at its option re-take possession of all such automobiles as the third party (the agent), may have on hand

on consignment unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles, or at the option of the first party, it shall be the duty of the third party, to endeavor to sell such remaining automobiles, notwithstanding the expiration of the contract, but if, at the end of three months he shall not have made such sales, the first party agrees on request of the agent, upon payment of 10 per cent additional of the list price, to sell said automobiles outright to the agent.

A contract right on the part of the consignor to take back property sold and return the consignee advances is as clear a negative of the assertion that the transaction was a sale by which the title passed as it is possible to conceive of, and if title had already passed and the automobiles became the property of the agent, why should he pay an additional 10 per cent, or receive a bill of sale of property already his?

By the preceding clause of the contract (Condition 46) either party to the contract, "shall be at liberty, **with or without cause**, to cancel and annul this contract at any time."

If a sale had taken place as to automobiles consigned to and in the agent's hands, nothing would remain on a cancellation of the contract except to

settle any balances not adjusted and the Ford Company could not re-take by refunding the price.

But Conditions 46 and 47 are not capable of such an interpretation, and demonstrate that there was no sale, and that the Ford Company could at its option re-take its machines and refund to the agent his advances.

The plaintiff in this case has deemed it to be for the best interests of its trade to itself retain control of the distribution of its product to actual users thereof rather than to sell the same outright to wholesalers and retailers and permit them to distribute on such terms as they may see fit.

Plaintiff believes that it is for the advantage of the manufacturer of a product of wide and general use by the public, to so deal with the public that each member thereof may feel that he is receiving as good consideration and treatment as each and every other member of the public, and only by retaining in its own hands contact with the ultimate consumer can this uniformity of treatment be secured.

As has been said, plaintiff believes that it is for its best interest to vend direct to the ultimate consumer through the medium of agents rather than sell outright to dealers who may vend to the ultimate consumer on such conditions as the dealer

may select, depriving the consuming public of that uniformity of treatment, which, amongst other things, contributes so highly to the popularity of plaintiff's automobiles.

It is a matter of common knowledge that plaintiff's product has a very wide distribution, and sells readily in response to a wide public demand. To act as an intermediary in the distribution of such a product, and thereby earn commissions, is a representation which naturally would be eagerly sought for, and to secure it agents may well and profitably submit to onerous conditions that might not be worth while in connection with a less popular product. Such a motive is sufficient to account for the willingness of an agent to agree to the requirement of an 85 per cent advance. He could even profitably advance to the manufacturer the full retail list price and all carrying charges and yet be well compensated when his commissions were paid to him.

VIII.

THE RECORD CONTAINS THE CONTRACT.

Bearing in mind that there is no syllable in this record impugning the good faith of the Ford Motor Company and its agents in making the contract under consideration, no valid reason exists

why the contract should be interpreted otherwise than by the usual tests or why it should not be construed in accordance with the usual and ordinary meaning of the language employed.

There is not even an ambiguity to which to attribute a doubt as to the intentions of the parties. To attribute to the parties some intention not to be found in the language employed is to disregard the contract actually made and clearly expressed, and attribute to the parties something not shown to have been even thought of, much less intended.

And why? The question can only be answered on the theory that, for some reason not disclosed by the record, the court has arrived at the conclusion that the parties intended to violate the law, and hence by reasoning backward it is concluded that the parties did not intend those results which alone can follow from the language of their written contract, but something sinister, some evasion, some device to conceal the real transactions, and therefore that what the parties called a consignment was actually a sale.

Having thus traveled in a circle to find a premise, the conclusion could easily be drawn that the Sherman law was violated and that the attempt by the Ford Motor Company to fix the price at which the automobiles made by it should be sold was beyond its right.

IX.

THE PRINCIPAL HAS THE RIGHT TO CONTROL ITS SALES AGENTS.

But a wide difference exists between the attempt by a patentee to project its control over prices to future sales after it has exercised the right to vend secured by the patent laws, and the power of a patentee to fix the prices at which its sales agents shall sell and to describe the territory within which the agent may act. This distinction is clearly apparent to the court in the case of **Waltham Watch Co. v. Keene**, 202 Fed. 225, 240:

“In the case of **D. E. Virtue and Owatonna Fanning Mill Co. v. Creamery Package Mfg. Co. et al.**, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. —, decided by the Supreme Court of the United States January 20, 1913, the Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, and in April, 1897, it created the Creamery Package Manufacturing Company, its sales agent of them, the latter not manufacturing, which the court held it had the right to do, and that in so doing it had the right to fix the prices at which **its sales agent should sell** and the territory in which it would sell, and even the

purpose for which it should sell. The court said:

‘It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights; but this was no violation of law. The owner of a patent has exclusive rights—rights of making, using, and selling. He may keep them or transfer them to another—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in *Standard Sanitary Manufacturing Co. v. United States*, ante. But patents are not so used when the rights conferred upon them by law are only exercised.’

“The case just cited has nothing to do with restrictions, license agreements, or contracts attempting to fix the prices of such articles on resales when the sole right of vending has once been exercised by the sales agent. As stated, an exclusive sales agent of the manufacturer under a patent is but exercising the sole right to vend expressly conferred by the patent statute.”

Cole Motor Car Co. v. Hurst, 228 F. 280, C. C. A.,

was case where, as in the case at bar, the lower court held contracts to be "sales" and hence in conflict with the anti-trust laws, and the Circuit Court of Appeals, on an analysis of the terms and conditions of the contract, reversed the case and held the contracts to be consignments, and not in restraint of trade.

Hurst was designated as "distributor." He had to remit in full for all sales and the company sent check weekly for commission due. If a sale, Hurst would have held out his commission. The distributor was bound to insure in the name of company. This presupposes an insurable interest and title in the company. There were provisions for cancellation of the contract and return of unsold cars. No conditions were attached to company's right to take back machines whenever it chose to do so. The company retained unqualified rights of dominion and control which were inconsistent with the theory that the transactions were sales.

Not only was the contract not contrary to anti-trust laws, but the court said:

"On the contrary, its effect is to foster the trade of the plaintiff company, and to enhance its business, to make secure its returns. This sort of arrangement is not obnoxious to the law. (*Phillips v. Clement Co.*, 125 F. 593.)

“It will be seen that it was not a contract which conveyed title to Hurst, and brought his control of the machines under the operation of the Texas law. Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices.”

No amount of care or thought could devise a contract that would more clearly express an intention to create the relationship of principal and agent between the Ford Motor Company and its agents and provide for consignment of automobiles to such agents, retaining to the Ford Motor Company, absolute control over the agents and their dealings as such representatives, than the contract now under review.

As was said in the last quotation:

“Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices.”

And why should not the same rule and reason apply if we substitute for the words “Cole Company” the words “Ford Motor Company”?

We submit that language precisely applicable to the case at bar was used in the case of *Sturm v. Boker*, 150 U. S. 323, 37 L. ed. 1093-9:

"It is too clear for discussion, or the citation of authorities, that the contract was not a sale of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consignment' employed in the letters were used in their commercial sense, which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other."

Again,

"The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. * * *

"The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title."

The case of *Harris v. Coe*, 71 Conn. 163, 41 Atl. 554, involved the construction of an oral contract

concerning which evidence had been recieved in the trial court. The Supreme Court said:

“Was the contract in question one of sale or bailment? What the terms of the agreement entered into by the parties were, is a question of fact, upon which the decision of the trial court is final. What the legal effect of the provisions of the contract is, is a question of law, which may be reviewed on appeal.”

And after reviewing the evidence and pointing out the good faith of the parties and concluding that the transactions showed a consignment for sale, the court said:

“A consignment of goods for sale is ordinarily a bailment. The word ‘consignment’ does not imply a sale. The very term imports an agency, and that the title is in the consignor.”

It will be seen that we are engaged in arguing in behalf of a contract which not only has every legal intendent in its favor, but is based upon sound business judgment and experience, and is effective to produce proper and desirable results. Because the effect of such a contract generally applied to all the representatives of the plaintiff and governing the distribution of its entire product of auto-

mobiles, is to enable the plaintiff to fix a uniform price at which all its automobiles shall be purchased by the ultimate consumer, does not create such a restraint of trade as to be violative of the Sherman Law, and yet we can only explain the contention that the contract is invalid by the assumption that any arrangement under which a uniform price to the consumer is fixed is violative of the Sherman Law, and that a premise must be found from which to deduce that conclusion, and the assumption that the transaction was a sale and not a bailment afforded the necessary premise. But a uniform price is not wrong in itself nor is it conclusive that there is a violation of the Sherman Act.

X.

RECENT LEGISLATION BY CONGRESS MATERIALLY AFFECTS THE RULES OF PUBLIC POLICY APPLICABLE TO PRICE MAINTENANCE CONTRACTS.

Congress, since the decision in the Miles case and the Sanatogen case, has made some most important pronouncements on the subject under discussion in those cases—pronouncements having an important bearing upon the so-called “Public policy as to uniform prices.”

Section two of the Clayton Act (Effective October 15, 1914) condemns discrimination in prices

between customers on the same commodity as unlawful, when employed to substantially lessen competition or create a monopoly.

This is a most decided declaration of Congress upholding the virtue of uniform prices and condemning the practice of making different prices to different people for the same article.

Section 5 of the Federal Trade Commission Act (Approved September 26, 1914) declares to be unlawful "unfair methods of competition."

Thus we have at the same session of Congress two important declarations affecting the public policy of the United States on this subject—one upholding the policy of uniform prices and the other condemning certain forms of competition.

Time was when any and all forms of competition were regarded as highly virtuous and worthy of encouragement by the court.

But these declarations point out clearly that the thing to be condemned is monopoly, whether produced by competition or combination.

Fundamentally this is the true and only inquiry—Do the acts in question tend substantially to bring monopoly? What then is monopoly? What constitutes such a monopoly as to be subject to condem-

nation by the courts? Do the acts under investigation tend substantially to bring about such a monopoly?

We submit no public good demands competition in a single article of manufacture of a single maker, where there are large numbers of manufacturers in the same line, and when there is abundant active competition in that line.

If uniformity of prices on the same article is desirable, then any system of a manufacturer designed to bring about such uniformity to the public should be favorably construed to effectuate such object, and should never be condemned unless plainly in itself illegal, that is mala in se.

XI.

A CONTRACT PRESUMED TO BE LAWFUL UNLESS THE FACTS CLEARLY IN- DICATE OTHERWISE.

It is our contention that the contract under consideration contemplated a normal, a proper, and customary relation between principal and agent, and we submit to the court that:

“A contract is not to be assumed to contemplate unlawful results unless a fair con-

struction requires it upon the established facts."

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940.

"But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Section 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful the former must be adopted."

In **Bigelow v. Calumet & Hecla Mining Co.**, 167 Fed. at page 728, the Circuit Court of Appeals said:

"But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence

of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to be created."

And further:

"The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the illegality of the contract assailed.

"In Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S., 179-184, 50 L. ed. 428, it is cogently said, in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful result under the anti-trust law, that 'a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.'"

The contract between plaintiff and its agent is clear and definite in language and precise in its use of terms, and no word can be found therein which even squints at a sale.

In fact the entire argument on which is based the conclusion that the legal effect of the contract is a sale to the agent begins and ends with Condition 10 of the contract (transcript p. 21), which

provides that the agent shall advance to the company eighty-five per cent of the list price of the automobiles to be consigned to him and receive fifteen per cent as his commission. The inconclusiveness of this reasoning to contradict the plain language of the contract or to impeach the good faith of the parties is apparent. It is a case of basing an inference on an inference and drawing thence a conclusion, a form of argument not to be tolerated in legal proceedings.

We find pertinent in this connection another quotation from **Hobbs v. McLean**, from which we have just quoted:

“This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck’s contract with the United States and to be a violation of the statute.”

The relation of the Ford Motor Company and its agent is that of bailor and bailee for mutual benefit, the subject of the bailment being the consignment of automobiles, and the object the employment to negotiate for sales by the bailor of its property. The relation might well be termed that of principal and factor—a relation long regarded as beneficial in the transaction of business, and one

whose legal effect has been defined by numerous decisions. The property consigned is bailed and remains in the ownership of the consignor until disposed of by the consignee in pursuance of the agency established by the fact of consignment.

The Ford Motor Company and its agents have the right to select the conditions under which they will contract, no matter how onerous those conditions may seem to others.

XII.

IF THE AGENCY CONTRACT BE IGNORED
AND A SALE CONTRACT BE CONSTRUCT-
ED BY THE COURT IT WAS AT LEAST A
SALE SUBJECT TO CONDITIONS. SALES
SUBJECT TO CONDITIONS ARE VALID.

We have thus far discussed the contract as it reads, and as the parties made it, and as we contend it should be considered, there being nothing in the record on which to impeach its good faith or question its terms as expressing the actual relationship between the parties.

It is to be remembered that no evidence was offered for the purpose of showing any violation of the Sherman Law, and on this aspect of the case we are restricted to the language of the contract itself.

It is our position that the contract in question is what it purports to be, an agency and consignment contract, and that the Sherman Act has no application to the transactions disclosed by the record in this case, but we are prepared to go further and contend that even though it be conceded for the purposes of argument that the contract is capable of being interpreted as providing for sales whereby the agent acquired the full and complete ownership of the automobiles consigned to him, yet, that nevertheless the Sherman Law was not violated. Unless the court is prepared to eliminate the contract in its entirety and itself construct for the parties a new contract out of the tenth condition of the actual contract, the transaction was at least a sale subject to conditions which must be complied with by the purchaser and which can be enforced against him.

XIII.

THE CONTRACT CONCERNED A PATENTED PRODUCT.

It appeared from the record that Ford automobiles are manufactured under numerous letters patent of the United States, and these patents are enumerated in the contract. (Transcript pp. 58-59.)

As a preliminary it may be well to remind our-

selves that a patentee is granted by the law broad and exclusive rights. He may make, sell, or use or not as he will. He may grant to others these rights or any of them, or any part of them or of any of them, and impose conditions on the exercise of the rights granted.

All discussion of this proposition has led to but one conclusion, as stated in **Paper Bag Patent Case**, 210 U. S. 424, 52 L. ed. 1122:

“It shows that, whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. ‘And, for his exclusive enjoyment of it during that time, the public faith is pledged.’ Chief Justice Marshall in *Grant v. Raymond*, 6 Pet. 242-3.”

And again in **Bemet & Sons vs. National Harrow Company**, 186 U. S. 70, L. Ed. 1059, the Supreme Court said:

* * *

“Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few

exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

The right of the patentee to sell the patented article **subject to conditions prescribed by contract between the patentee and the vendee** has been recognized by numerous decisions of the Supreme Court, and restrictions thus created are within the rights secured to the patentee by the patent laws and not obnoxious to the Sherman law.

In the case of **Keeler v. Standard Folding Bed Co.**, 157 U. S. 657, 39 L. ed. 848, the court said:

"Where the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, **unless restrained by contract** with the patentee, can sell and dispose of the same."

After discussing several prior decisions as to the rights of a patentee the court further said:

“The scope and effect of those decisions were thus expressed by Mr. Justice Clifford, in *Mitchell v. Hawley*, 83 U. S., 16 Wall. 547 (21 L. ed. 323):

“Patentees acquire by their letters patent the exclusive right to make and use their patented inventions and to vend to others to be used for the period of time specified in the patent, but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee when he has himself constructed a machine and sold it **without any conditions**, and the consideration has been paid to him must be understood to have parted to that extent with all his exclusive right.’”

In the preceding and following quotations the black-face are ours and call attention to the recognition by the courts of the distinction we make that it is only a sale **without condition or restriction** that passes the patented article out from under

the monopoly which the law secures to the patentee.

In the Dick case (224 U. S. 1), the court said:

“By a sale of a patented article **subject to no conditions**, the purchaser undeniably acquires the right to use the article for all the purposes of the patent, so long as it endures. He may use it where, when, and how he pleases, and may dispose of the same unlimited right to another. This has long been the settled doctrine of this and all patent courts. . . . By such an **unconditional** sale of the thing patented it is said to be ‘no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.’

“In the cases cited above, as well as in the leading case of **Bloomer v. McQuewan**, 14 How. 539, the statement that a purchaser of a patented machine has an unlimited right to use it for all the purposes of the invention, so long as the identity of the machine is preserved, was made of one who bought **unconditionally**; that is, **subject to no specified limitation** upon his right of use.”

And further:

“An **absolute and unconditional** sale operates to pass the patented thing outside the boundaries of the patent, The rule and its reason is thus stated in **Robinson on Patents, Vol. 2, §824:**

‘The sale must furthermore be unconditional. Not only may the patentee impose **conditions limiting** the use of the patented article, upon his grantees and express licensees, but any person having the right to sell may, at the time of sale, restrict the use of his vendee within specific boundaries of time or place or method, and these will then become the measure of the implied license arising from the sale.’ ”

Further:

“We repeat. The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be **unconditional.**”

And in the same case the court said:

“Where, then, is the line between a law-

ful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye shall we read a meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which large ends are to be attained, and therefore to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain. In **E. Bement & Sons v. National Harrow Co.**, 186 U. S. 70, 89-92, 46 L. ed. 1058, 1068, 1069, 22 Sup. Ct. Rep. 747, this court quoted with approval the language of Chief Justice Marshall in **Grant v. Raymond**, 6 Pet. 218, 241, 8 L. ed. 376, 384. Concerning the favorable view which the law takes as to the protection extended to the exclusive right, the court, through Chief Justice Marshall, said:

“‘It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield, it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged.’”

And further, in discussing the prior case of **E. Bement & Sons against National Harrow Company**, 186 U. S. 70, the court said:

“In **E. Bement & Sons** there was involved the legality of certain contracts between patentees of and dealers in patented harrows. The purpose and effect of the combination and of the contracts between the

parties was to fix and keep up the prices at which licensees might sell the patented harrows. It was claimed that the combination and contracts were obnoxious to the Sherman act; but, upon the other side it was said that as the contracts concerned only the sale of patented articles, that that act did not apply. The character of the monopoly granted under the patent act was therefore involved. Touching the right of the patentee to exclude all others from the use of his invention, the court quoted with approval what was said in the **Button-Fastener Case**, 77 Fed. 288, as follows:

“‘If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own.’”

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“In that case the question was not one of infringement, but one arising in a suit to enforce certain contracts directly restraining commerce in patented articles which were claimed to violate the Sherman law, although the agreements covered only patented articles. The court, after referring to the exceptions to the patentee’s monopoly resulting

from conflict with the police power of the state, said:

“Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.’

“Now if this was a suit to recover damages upon the contract not to use the machine except in connection with other articles proper in its use, made by the patentee, the only possible defense would be that the agreement was one contrary to public policy, in that it affected freedom in the sale of such articles to the user of such machines. But that was the nature of the defense made to the suit to enforce the agreements under consideration in the Bement case. The court in that case found that the contracts did

include interstate commerce within their provisions and restrained interstate trade, but with reference to the Sherman Act (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200) said:

“‘But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.’

“‘As to whether the restrictions upon sales imposed by the agreements were ‘legal and reasonable conditions,’ the court said:

“‘The provision in regard to the price at which the licensor would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented ar-

ticle can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.'

"If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable.

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"The provision in regard to the price at which the licensor would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can,

of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In the Bement case it is held that a license to make and sell can be burdened with restrictions on the price at which the licensee can sell.

After such a licensee has paid the cost of manufacture and the royalty to the patentee it is impossible to distinguish his position and title as to the product from that of one who has acquired the patented article from the patentee paying a price which includes the same elements and is substantially the same as that paid by a licensee, that is to say, the cost of manufacture and a compensation to the patentee based on his ownership of the patent.

And, as was said in the Bement case,

"The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was therefore the owner of a monopoly recognized by the Constitution and by the statutes of

Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it."

That we have stated the correct rule is borne out by the interpretation put on the Sanatogen and Bobbs-Merrill decisions in some recent cases.

In *American Graphophone Co. v. Boston Store*, 225 Fed. 785, the court in quoting from those decisions pointed out that in those cases there was no question of **contract** but only of attempt to fix prices by **printed notices**, and concluded:

"That an agent or vendee of a patentee may, by **direct covenant or agreement**, be bound to the observance of price restriction, imposed as a condition upon which exclusive right of sale by the patentee is being exercised."

And in discussing the *Bement* case, which settles the rights to impose price restrictions on a licensee to make and sell, the court said:

"The covenant for price restriction in the *Bement* and other cases referred to, although found in a license to manufacture and sell, was germane to the patentee's exclusive right

of sale. . . . It is impossible, in my judgment, to draw a tenable distinction between those cases and the case of a direct sale by the patentee of his patented article."

The opinion of the Circuit Court of Appeals, Seventh Circuit, in the case of **Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.**, 154 Fed. 359, is full and convincing.

In that case the arrangement by which the patentee sought to maintain prices, was attacked as in violation of the Sherman act.

The court, in the course of its opinion, said:

"Under its constitutional right to regulate interstate commerce Congress made illegal 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states,' and subjected to liability to fine or imprisonment 'every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states.' Congress, having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to

the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states. The evils to be remedied by the Sherman law are well understood. Articles in which the people are entitled to freedom of-trade were being taken as the subject of monopoly; instrumentalities of commerce between which the people are entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial; the result is the criterion. The true test of violation of the Sherman law is whether the people are injured, whether they are deprived of something to which they have a right. **Northern Securities Co. v. United States**, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.

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“The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not

a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

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"None of the provisions of the contract, in our judgment, touched any matter outside of the monopoly under the patent. The control of prices and output, for reasons already stated, did not deprive the public of any right."

XIV.

A PRINCIPAL MAY LAWFULLY CONTROL ITS
AGENTS.—COMPETITION NOT
AFFECTED THEREBY.

It should be borne in mind that the case at bar is not one where rival manufacturers of competing products seek to eliminate competition in the sale of their products, but concerns only the marketing of one independent product actively competing with scores of other automobiles of equal or greater attractiveness. The distinction is pointed out in the case of **Blount Manufacturing Co. v. Yale & Towns Manufacturing Co.**, 166 Fed. 555, where owners of competing patents entered into an agreement for the elimination of competition and the pooling of profits. The court said of that:

“A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefit of competition, and creates a restraint of trade.”

But, the court also uses language which seems to us to cover all that plaintiff could be charged with having done in its attempt to regulate the prices at which its product should be sold:

“It seems self-evident that a contract which is only co-extensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman act. The monopoly granted by letters patent is of a particular invention. Devices thus protected by patents are as a matter of fact in commercial competition with both patented and unpatented devices.”

Assuming that the contract in the case at bar was a contract whereby the patentee sought to regulate the prices at which the patented article should be sold, we contend that such a contract is only co-extensive with the monopoly to which the patentee is by law entitled. The contract does not restrain trade beyond the life of the patent, or create any additional restraint of trade beyond the privilege which the patentee unquestionably has to vend the patented article or refrain therefrom and refuse to the public the use of it.

As was said by the Supreme Court in **Virtue v. Creamery Package Mfg. Co.**, 227 U. S. 32, 57 L. ed. 393, 404:

“The owner of a patent has exclusive rights,—rights of making, using, and selling. He may keep them or transfer them to an-

other,—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we stated in **Standard Sanitary Mfg. Co. v. U. S.**, 226 U. S. 20, 57 L. ed. 107. But patents are not so used when the rights conferred upon them by law are only exercised. The agreement of the 19th of April, 1897, constituted, as we said, the Creamery P. M. Co. a sales agent of the churns and butter workers and fixed their list price.”

And after further discussing the contracts alleged to be in restraint of trade the court said:

“The Owatonna Company **did nothing more in its contract** with the Creamery Package Mfg. Co. **than to make that company its exclusive sales agent, and this was no violation of law.** . . . But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture, or of sale, is not one condemned by law.”

In the Dick case the court further used this pertinent language:

“The market for the sale of such articles to the users of his machine, which, by such a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction, he took nothing from others, and in no wise restricted their legitimate market.”

Suppose the Ford Company had itself rented stores or garages in each of the towns where it desired to have its automobiles sold and put in charge there of its employees, and secured by borrowing from local banks the money it might need, pledging as security therefor the automobiles shipped to the local garage, certainly no question would or could be raised as to its right to instruct those employees as to their duties, including the prices at which they could sell automobiles. Here certainly would be no restraint of trade.

And the situation is legally in no way different where the Ford Motor Company selects and appoints a local man as an agent and consigns automobiles to him to find buyers therefor to whom it can sell, and requires that agent to maintain a garage and shop for giving service to Ford owners

and receives from that agent by way of advances against consignments of automobiles such sums of money as may be agreed upon.

Such an agent is no less under the direction and control of the Ford Motor Company than an employee sent out from the factory. The principal is certainly not prohibited by any rule of law from dictating the prices at which its automobiles shall be sold by its agents, nor is the situation altered by the fact that there are hundreds of similar agents all governed by identical contracts.

By the contract shown in this record the relationship created is that of principal and agent and if the contract is interpreted by the usual canons of interpretation, no other meaning can be found in it.

Nothing in this record justifies the suspicion of an attempt to evade any law. The fact that the Ford Motor Company is a very large concern, that its production of automobiles is enormous, that its agents are very many, surely is not yet a violation of law.

“There is no limit in this country to the extent to which a business may grow.”
United States v. Eastman Kodak Co., 226 Fed. 80. **United States v. International Harvester Co.**, 214 Fed. 1000.

We respectfully submit that the conclusion that the Sherman law is violated by the contract under consideration can only be explained by the mere bigness of the transactions involved. Having arrived at the conclusion that the Sherman law was violated, a premise could be found for that conclusion only by holding that there was no agency or consignment but rather a sale by the pretended principal to the alleged agent, and hence a mere device to evade the Sherman law.

XV.

RESTRICTED OR CONDITIONAL SALES.

But the premise is not sufficient to support the conclusion.

The agent, if he be held a buyer, did not buy for use but only for resale, and the transaction was a sale subject to restriction, not an unconditional sale, and no appellate court has yet denied the patentee the right **by contract** to impose conditions on the disposition that a purchaser for resale and not for his own use may make of the patented article. The right to refuse to sell at all is beyond question, and that right includes the right to make any kind of a partial or restricted sale that may be agreed on.

The market for Ford automobiles was one created by the Ford Motor Company and as the Supreme Court said in the Dick case, in the last quotation just made:

“was a market which he alone created by the making and selling of a new invention.”

And again:

“By selling it subject to the restriction, he took nothing from others and in no wise restricted their legitimate market.”

And in further discussing this right of a patentee to sell or refuse to sell the court further said in the Dick case:

“This was pointed out in the Paper Bag case, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement, because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lessor of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make,

to sell and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries required to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands, it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from circuit courts and circuit courts of appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

"The conclusion we reach is that there

is no difference, in principle, between a sale subject to specific restrictions as to the time, place, or purpose of use, and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee.

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“Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be used only in connection with certain other things to be bought from the patentee. We deem it well, however, to refer to the opinion of the circuit court of appeals of the eighth circuit, delivered by Judge (now Mr. Justice) Van Devanter in *National Phonograph Co. v. Schlegel*, cited above, because it draws so clearly the distinction between a conditional and an unconditional sale of a patented article. Speaking for the court, Judge Van Devanter said:

“An unconditional or unrestricted sale by the patentee, or by the licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that

the sale is subject to any restriction upon the use or future sale, the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer.' ”

National Phonograph Co. v. Schlegel, 128 F. 733, from the opinion in which the Supreme Court took the quotation above repeated, and gave to it the stamp of its approval, was a case where a **contract** was entered into binding a purchaser not to resell for less than certain named prices, or to any other dealer who did not sign a contract, and **it was held that such contract was valid and enforceable** in a suit to restrain future violations of the contract.

The Ford Motor Company is given by law a monopoly under its patent enumerated in the contract in question. It is entitled to refrain from making, or vending, or using the patented article,

and it is entitled to prescribe the conditions under which it will permit others to make, sell or use, and no steps which it may take to protect those rights can be obnoxious to the Sherman law.

XVI.

DISTINCTION BETWEEN RIGHT TO CONTROL SALES AND PRICES BY CONTRACT AND ATTEMPT TO DO SO BY NOTICE.

We pass now to the distinction apparent in the leading cases between what may be done by a contract between parties in privity and what cannot be done by attaching a notice to an article sold. This distinction is apparent in many of the cases we have hereinbefore discussed, and we have been at some pains to call attention to it.

THE SANATOGEN AND MILES MEDICAL COMPANY CASES DISTINGUISHED.

The case of **Dr. Miles Medical Company v. John D. Park & Sons**, 220 U. S. 373, did not involve patented articles, or rights under the patent law. The other case,—**Bauer v. O'Donnell**, 229 U. S. 1-10, 57 L. ed. 1041-3,—contains no mention of the Sherman Act and was a suit to restrain the alleged infringement

of a patent by a retail dealer in selling at a price less than that marked on the package.

In the Miles Medical Company case the articles sold were made under a secret process but not protected by any letters patent. In that case the Court said in this connection:

“First. The first inquiry is whether there is any distinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensees should sell. The Court said, referring to the act of July 2, 1890 (p. 92): **‘But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor.** Such a construction of the

act we have no doubt was never contemplated by its framers.'

"But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution.

* * * * *

"The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and **the extent of the right which that law secures is not here involved or determined.**"

(Black-face ours.)

Packages of "Sanatogen" were marked with a notice that they were not to be sold by retailers at less than \$1.00 per, and infringement of the patent was charged against a retailer who sold for less.

All that was decided was that there had been no infringement, and that the Sherman law was not involved.

The Court in the course of its decision said:

"The patentee relies **solely** upon the notice

quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were **neither the agents nor the licensees of the patentee.**"

(Black-face ours.)

It was held that the holder of the patent could not thus control the price. Where purchase was made from one who had full title and right of disposition it passed free from price restriction.

It will be noted by the quotation that the Court carefully discriminates from a situation where the vendor is **an agent** of the patentee imposing the price restriction, and hence the case not only is not an authority for the respondents, but inferentially supports our contention that a patentee can, by proper contract, make a sale on condition, or create an agency for future sale, and retain the right to fix the price at which the user may buy, and bring the patentee and buyer into immediate relationship of vendor and vendee through an agent selected by the vendor.

There was no question in the 'Sanatogen' case of the violation by the retailer of a direct contract with the holder of the patent and the case did not decide that the holder of the patent could not con-

tract directly with the retailer as to the price at which the patented article should be sold to a user.

That case did not hold it illegal to attempt to fix the re-sale prices of the patented articles—but only that the attempt in that instance was not successful because it was **a mere notice**, not binding on strangers under the circumstances.

That case did not pretend to overrule numerous prior cases holding that it is entirely competent and proper to establish a monopoly in a patented article. It only said that it could not be done by a notice.

That case did not attempt to revolutionize and overturn the law giving the patentee the exclusive right to vend the article. It merely said that in that case he had exhausted his right to vend when he sold at his full price, and that a mere notice did not qualify or restrict the title thus sold.

Note the important distinction. In the Dr. Miles case the Court held it was illegal and unlawful to attempt to control re-sale prices of unpatented articles, because contrary to the anti-monopoly laws.

But in the Sanatogen case the Court did not hold that it was illegal or unlawful to control re-sale prices of patented articles, but only that the particular plan was not effective.

It has always been lawful to monopolize a patented article. "Its very nature is that of a monopoly" says the Bement case.

The Sanatogen case was a suit against sub-vendees to compel them to obey a notice, which notice was in distinct opposition to the title vended. This is a case to compel respect for signed contracts, contracts absolutely lawful in themselves.

XVII.

OTHER CASES DISTINGUISHED.

**Standard Sanitary Mfg. Co. v. U. S. 226 U. S.
20-49, 57 L. ed. 107.**

Was a suit by the Government to enjoin violation of the Sherman Act. There was a combination of a large number of manufacturers and several patents and a combination to control trade contrary to the Sherman law.

The fact that patent rights were held by some or all of the defendants was held not enough to enable the defendants to escape the law.

Even where the question of patent monopoly is involved, however, a system of uniform trade agreements based upon the use of a patented invention

which transcends what is necessary to protect such monopoly, and which practically controls the output and dictates the prices from producer to consumer on nearly **all sides of sanitary enameled iron-ware** throughout the country as illegal and void. This was an attempt under cover of patent rights to control trade on articles **not covered by any patents.**

In *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, suit was brought to restrain the sale of a copyrighted book at retail at less than \$1.00 for each copy, basing it on a printed notice in the book.

As the Court said:

“The facts disclose a sale of a book at wholesale by the owners of the copyright, at a satisfactory price, and this **without agreement between the parties** to such sale obligating the purchaser to control future sales, and where the alleged right springs from the copyright law alone.” * * * * *

“In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who **made no agreement** as to the control of future sales of the book, and took upon themselves no **obligation** to enforce the notice printed in the book.” * * * * *

“In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, **with whom there is no privacy of contract.**”

(Black-face ours.)

The decision in the Bobbs-Merrill case, as well as in the Sanatogen case, was grounded solely upon the principle that the owner of a patent or copyright cannot qualify the title passed by means of a **mere notice attached to the chattel**, so as to restrict third persons in the sale of such articles.

In the case of **Straus v. American Publishing Company**, 231 U. S. 222, 58 L. ed. 192, there was a combination of seventy-five (75%) per cent of the publishers and a majority of the booksellers in the United States united in an agreement not to sell copyrighted books (originally uncopyrighted as well) to dealers who would not maintain prices and it was held that where a copyrighted book had been sold and passed out from under the monopoly permitted by law, the price could not be kept up by **printed notices of retail price attached to the book.**

In the case of **Victor Talking Machine Company**

v. **Strauss**, 230 Fed. 449, the Circuit Court of Appeals followed the Dick rather than the Bobbs-Merrill and Sanatogen cases, and held that the plaintiff was entitled to the relief prayed for by its bill, and could maintain prices by a notice attached to the machine. This case has recently been reversed by the Supreme Court of the United States in an opinion not yet printed, and which at this time it is not possible to discuss, but it is to be assumed from the way in which the Supreme Court has regarded these questions in the Sanatogen, Bobbs-Merrill and other recent cases that the reversal was based upon the distinction, which we are urging in this case, between rights protected by direct contract and the attempt to restrict the ultimate purchaser by a **mere notice** attached to the machine.

In the case at bar, we are not attempting to claim anything by reason of any notice, but only to maintain the integrity of a contract as between the parties thereto.

We think we have quoted enough of the language of the Courts to make plain our proposition that a patented article does not pass out from under the monopoly unless a sale or transfer has been **unconditional** and **unrestricted**, and by no possible manner of interpretation can there be any escape from the numerous conditions under which the Ford Motor Company consigned automobiles to its agents.

We may then sum up this branch of the argument by saying, **FIRST**, that under the contract, whether construed as an agency contract or sale, the automobiles had not passed out from under the monopoly of the patentee; and, **SECOND**, that while it could be conceded that parties competent to contract may make any contract which they see fit, that no Appellate Court has yet held that the Sherman Aact was violated by a **contract** between the patentee and his vendee restricting the price at which the patented article may be sold, or the conditions under which it may be used, or the territory within which it may be sold.

In the Sanatogen case, which related to a patented article, it was held that the holder of the patent could not project his control forward to a subsequent purchaser by **notice** printed on the package, but there was not in that case any question of the violation of a **contract** or of the prohibition of the Sherman law.

In the **Miles Medical Company** case the Court used this language:

“Nor can the manufacturer by **rule and notice** in the **absence of contract or statutory right**, even though the restriction be known to purchaser, fix prices for future sales.

“Whatever right the manufacturer may

have to project his control beyond his own sales must depend not only upon an inherent power incident to production and original ownership, but upon agreement."

The black-face type in the quotations just made is ours, for the purpose of calling attention to the fact that the Court evidently recognized that **by contract** the patentee can project his control beyond his own sales.

This distinction has been recognized in cases of which *United States v. Kellogg Toasted Corn Flakes Co.* 222 Fed. 725-731, is an example. There the Court called attention to the fact that *Bobbs-Merrill Co. v. Straus and Bauer v. O'Donnell* were infringement suits—the one under a copyright, and the other under a patent and to that part of the decision in the *Bobbs-Merrill* case where it was said that,

"There is no claim in this case of **contract** limitation, nor license **agreement** controlling the subsequent sale of the book."

In *United States v. Keystone Watch Case Co.* 218 Fed. 502-514, the Court said:

"The defendant company attempted to restrict the prices at which the wholesaler or jobber might sell to the retailer, and to this end made a **direct agreement** with the jobber.

As we understand the decisions, such an agreement was within the company's lawful rights. Certain material parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose and as the owner of these patents the company **had the right to make a direct agreement** with the jobbers whereby a minimum price was fixed at which the jobber might sell."

XVIII.

THE DECISIONS OF THE COURTS IN FRANCE, BELGIUM AND GERMANY ON THIS IDENTICAL QUESTION RECOGNIZE THE DIFFERENCE BETWEEN A CONTRACT REGULATING RE-SALE PRICES AND A MERE NOTICE ATTACHED TO THE ARTICLE; AND THEY UNIFORMLY HOLD THE CONTRACT BINDING, BUT THAT A MERE NOTICE IS INEFFECTIVE AND NOT BINDING.

See the cases collected in the publication recently issued by the Department of Commerce of the United States, Bureau of Corporations, entitled "TRUST LAWS AND UNFAIR COMPETITION," issued by the Government Printing Office in 1916.

FRANCE:

“Agreements to maintain fixed re-sale prices are regarded in France as legal and binding. The merchant who cuts the re-sale price after entering into such an agreement is held to have committed an unlawful act, as well as an act of unfair competition, against those of his competitors who keep their agreements. Such agreements to maintain re-sale prices are binding only upon the parties to the agreement. The manufacturer or distributor, except as noted above, has no ground for action against a merchant who cuts prices if he has not entered into a contract to maintain it. The following cases will illustrate these principles:

* * * * *

“A dealer in perfumery entered into an agreement with the manufacturer not to sell nor allow to be sold the products at prices below those fixed as a minimum * * * * * The Court sustained the right of the manufacturer to sell his goods subject to such conditions as he might impose upon the purchaser.

“The Society des Eaux minerales de Vittel distributed to the trade a circular, fixing prices * * * * * The Society brought suit

against a certain Brunet for selling below the fixed price. It was proved that Brunet bought the bottles not from the plaintiff but from a dealer who had not imposed any obligation upon Brunet regarding a re-sale price. The Court refused to consider the notice on the label as binding upon dealers to maintain the price noted thereon, and accordingly held that since no contract existed between the parties Brunet was free to resell his goods at prices that suited him."

Trust Laws and Unfair Competition, pp. 579-580, where are given the references to the cases.

BELGIUM:

"Defendant, a retailer, made a verbal contract with plaintiff, a manufacturer, not to sell his kind of little cigars below the price fixed by the latter and marked on the box. It was shown that defendant had broken this contract. The Court awarded damages to the plaintiff. * * * * *

"Defendant sold some little cigars below the price marked on the box. The notice on the box also stated that anyone not maintaining this price, or, while maintaining the price, depreciated the article by giving premiums,

would be prosecuted. There was no contract between the parties to the suit or between the defendant and the distributor to maintain prices. The Court held that in reducing prices defendant had not committed an unfair act against the manufacturer.

“A retailer sold Pall Mall cigarettes at Antwerp and Brussels below the prices indicated on the outside wrapper of the boxes. He had not entered into any contract to maintain prices. The Court decided, therefore, that he was not guilty of unfair competition against the manufacturer, holding that the right of the merchant to dispose of his goods as he sees fit is absolute if they have been legitimately procured; that the notice on the goods that they cannot be sold below a certain price does not impose upon them a condition which should be transmitted with them, and that, while the seller can bind the purchaser not to resell below a certain price, and this legal contract is obligatory for the one who makes it, it does not bind others than the contracting parties. The Court further held that the defendant had committed no unlawful act, since it was not alleged that by conniving with certain purchasers he had obtained from them the goods at prices permitting him to resell at a profit below the fixed prices, causing

them in his personal interest to break their contract with plaintiff, nor had he done anything to discredit the products.

“A similar action was brought against the defendant in the above case for selling the “Petit Larousse Illustré” dictionary below the price fixed by the publishers. It was shown that the plaintiffs had refused to deliver their books to defendant, because he would not agree to maintain the price, and that in spite of this defendant had procured indirectly a large number of copies which he sold below the fixed price. The Court of Appeal did not consider how the defendant procured the books, but decided that he had not committed an act of unfair competition in cutting the resale prices, since he was not bound by any contract.

“An association of manufacturers of pharmaceutical products sought to maintain a fixed price by various tactics, such as refusing to deliver to dealers not parties to the agreement, or deliveries to them only at the price fixed for sale to the public, so that it was impossible for them to make any profit. The Court held that while the manufacturer or proprietor of a product is free to sell it at any price that he chooses or to refuse to sell

it at all, and can also impose upon the purchaser the condition not to resell except at a fixed price, and concerted tactics of the defendant association were a restraint of the freedom of commerce and industry."

Trust Laws and Unfair Competition, pp. 592-593, where are cited the authorities quoted.

GERMANY:

"Contracts by which producers bind the persons to whom they sell not to resell at less than a fixed minimum price are considered legal in Germany and the breach of such contracts constitutes an act of unfair competition which affords a ground for injunction and the recovery of damages. * * * * *

"A retailer who was not bound by contract sold some goods below the retail price fixed by the factory. The factory brought suit under section 1 of the law of 1909, Sec. 826 of the Vicil Code, on the ground that the defendant was cognizant that all of the customers of the factory were bound not to sell below a fixed price. The court rejected this view and held that a factory could not prohibit a third party with whom it had no contract from selling its products at a lower price than the minimum

which it had fixed, for the goods might have been secured from some middleman who was not bound by the party who bought the goods from the factory.

The Court said in part:

“In any case we cannot agree with plaintiff that an act repugnant to good morals is involved merely in the reselling of the goods for less than the price imposed by the plaintiff upon his customers. The defendant has the right to sell the goods, which he has procured in an honest way, at any price satisfactory to him. If he is to act in a manner contrary to good morals, an element of unfairness must be involved, such as causing the party from whom the goods were purchased to break his contract with the plaintiff. In the absence of such an element, such agreements between manufacturers and wholesalers would, from the standpoint of the plaintiff, have, so to speak, a material effect, and a shackling of business would result which would be altogether unendurable, and which in certain cases might itself even be considered as repugnant to good morals.” * * * * *

In another case of the same kind the defendant in selling cigarettes at a discount, removed the iden-

tifying number, so that it was impossible for the exclusive agent to ascertain which middleman was breaking his contract by not binding sub-dealers. The Court held that the defendant had committed an act repugnant to good morals by wilfully abetting the breach of contract of his suppliers, by buying at various times from them the cigarettes of the plaintiff sold in violation of the agreement made with the plaintiff, by removing the identifying number in order to prevent anyone from finding out his source of supply, and by selling the goods at less than the fixed price. Such acts, the Court held, were not in harmony with the rules of propriety observed by all just and reasonable men and were a violation of section 1.

Trust Laws and Unfair Competition, pp. 651-652, where are cited the authorities quoted.

In considering the Miles Medical Company and "Sanatogen" cases and their application in a case involving a different state of facts, or rather a total absence of the facts on which those decisions depend, it is well to bear in mind the observation of the Court in the "Sanatogen" case that,

"No more is to be decided in each case than is directly in issue."

XIX.

TO SUPPORT THE CONTENTION IN THIS CASE IT WILL BE NECESSARY TO DECIDE THAT A PRINCIPAL CANNOT MAKE IDENTICAL CONTRACTS WITH A LARGE NUMBER OF AGENTS AND CONTROL THEIR CONDUCT AS SUCH AGENTS IF TO DO SO WILL FORBID THOSE AGENTS FROM COMPETING WITH EACH OTHER AND THEREBY WITH THE PRINCIPAL HIMSELF.

But if the Court finds itself able to disregard the contract and convert a consignment into an absolute sale, it will further be necessary, to support the decree, to hold that a patentee cannot by **contract** restrict the price at which **the party contracting** may sell the patented article, a limitation never heretofore imposed.

We have discussed these phases of the case thus fully, and may well conclude this part of our argument by quoting from the Button Fastner case (77 Fed. 288-294), which has met the approval of the Supreme Court:

“Upon what authority are we to circumscribe the exercise of the privileges awarded a patentee? In considering any question in

respect of restraints upon the liberty of contracting, imposed by principles of public policy, we should bear in mind that very high considerations of public policy are involved in the recognition of a wide liberty in the making of contracts; this caution was well expressed by Sir George Jessell in *Registering Co. v. Sampson*, L. R. 19 Eq. 462-465, who said:

‘It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.’

“Especially is this caution applicable when we sit in judgment upon the limitations which a patentee may put upon the use of his invention.”

Under any view of the contract there was no undue restraint of trade.

XX.

APPLICATION OF THE RULE OF REASON.

We are now ready to advance with the argument a step further and submit that it is immaterial whether the contract under discussion created an agency or effected a sale, for the reason that under the rule of reason as laid down by the Supreme Court in the Standard Oil and Tobacco cases the Sherman law has not been violated.

We submit that the contract between the plaintiff and its agents does not restrain trade within the meaning of the Sherman Act but is only a reasonable provision for the conduct and extension of plaintiff's business and the sale of its products. While the contract fixes the prices at which Ford automobiles can be sold to the public, that is not the only or the principal end sought but is only incidental.

Plaintiff seeks by its agency contract, among other things, to be represented by agents who will not only advance the sale of Ford automobiles but at the same time maintain the standard of service and accommodation to Ford owners which is so important to the popularity of an automobile and more than anything else promotes its sale.

"A. I made it a point after calling on the

agents in each town, in my spare moments to call on the Ford owners, who owned Ford cars, and in a round-about way, without disclosing my identity, find out the kind of service they were getting from the agents in that particular district or locality; whether the service was good, or whether they had over-charged them, and whether they were taken care of in parts and everything that would be of benefit to the Ford owner. I considered it my duty when I was with the company to do that as a protection to the man who owned the car.” (Transcript p. 286.)

In this connection we can well quote the language used by the Circuit Court of Appeals for the eighth circuit, speaking by Judge Sanborn, in the case of **Joseph P. Whitwell v. Continental Tobacco Company et al.** (125 Fed. 454), 64 L. R. A. 694, 695, 697:

“If, on the other hand, it promotes, or but incidentally or indirectly restricts, competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. *Hopkins v. United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19

Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; *United States v. Joint Traffic Asso.* 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 44 L. ed. 136, 149.

* * * *

“In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McNie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such contract, combination, or conspiracy between them can be a violation of this law, unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition be-

tween them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers."

And the same Court speaking again by the same judge said in **Phillips v. Iola Portland Cement Co.** 125 Fed. 594, 595:

" * * * * * The only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the State of Texas.

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle com-

petition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Hopkins v. U. S.* 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. ed. 290; *Anderson v. U. S.* 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. ed. 300; *U. S. v. Joint Traffic Assn.* 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. ed. 259; *Addyston Pipe & Steel Co. v. U. S.* 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. ed. 136; *U. S. v. Trans-Missouri Freight Assn.* 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. ed. 1007; *U. S. v. Northern Securities Co. (C. C.)* 120 Fed. 721, 725. The

application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed."

The rule applicable is summed up in *Bigelow v. Calumet & Hecla Mining Co.* 167 Fed. 704-712, where the Court said:

"We are brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the Federal statute merely because it may indirectly, incidentally, or remotely restrain trade or tend towards monopoly. If its necessary effect is to stifle or to directly and sub-

stantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect are to promote the business and increase the trade of the consumers, it is not denounced or voided by that law. U. S. v. E. C. Knight Co. 39 L. ed. 325, 43 L. ed. 290-300."

No fact or evidence or statement exists in this case to justify even an inference that trade in automobiles has been in the least restrained by the contract under discussion.

There is nothing in the record in the case at bar to indicate that the contract therein involved was anything more than one of "the ordinary contracts or combinations of manufacturers, merchants, and traders," or that it contained anything more than "the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful."

It is contrary to the knowledge and experience of every man in the community to claim that such a contract could have any effect to restrain trade in automobiles, when it is common knowledge and every day experience that the different makes of automobiles are too numerous to keep track of, all actively and persistently competing for business. The difficulty that confronts the public is not a trade un-

duly restrained, but rather how to escape the solicitations of rival agents eagerly hunting down a prospective or possible purchaser.

As was said by the Circuit Court of Appeals for the fifth circuit in the case of *Cole Motor Car Co. v. Hurst*, 228 Fed. 280:

“There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements. The public, indeed, finds it no small task to avoid the competition and solicitations of the agents or consignee of such companies. Periodicals of every description portray, advertise, and enlarge upon the variety and superiority of their excellencies. There, surely, then, has been no restraint of this trade. Was it not, then, easily possible that in the flourishing counties of the Lone Star State enumerated in the contract, notwithstanding the same, any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson, or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely varying

prices? Where, then, is the restraint of trade in this transaction?"

It is beyond question that contracts of the character under discussion, not only do not operate to restrict competition, but on the contrary stimulate the agents to greater zeal and activity in pushing sales and thereby directly stimulate competition.

The restraint, if any, is so far a mere incident to the main purpose of extending the sales of the manufactured product that it cannot bring the contract within the provision of the Sherman Act without running counter to the rule of reason which forms the guide to the consideration of the law by the Supreme Court.

The changed viewpoint from which these questions are to be considered was succinctly stated in the case of *O'Halloran v. American Sea Green Slate Co.* 207 Fed. 187-190:

"The contention for a long time made, and still continued by many, that any agreement which to any extent and in any degree whatever effects or restricts and limits interstate commerce is illegal, is not supported by the recent decisions of the Supreme Court, and it seems to be settled that there must be an undue restriction or restraint, the question of

fact to be settled by the Court applying the rule of reason."

In discussing the case in which the Supreme Court enunciated the rule of reason, Judge Lacombe said:

United States v. Hamburg-American S. S. Line, et al. 216 Fed. 971, 972, 974,

"The writer's opinion as to what, under prior decisions, was the construction to be given to the Sherman Anti-Trust Act, will be found fully set forth in *U. S. v. American Tobacco Co.* (C. C.) 164 Fed. 700. If that construction were followed in this case, there could be no doubt as to the conclusion to be reached upon the facts proved. It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with so that the proportions of it carried by the various lines, which have so combined, are not as they would be if full, free and unrestricted competition were the sole controlling power to effect the distribution.

"Since the decision above cited, however,

there have been two exhaustive opinions of the Supreme Court dealing with this act: *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912-D 734; *United States v. American Tobacco Co.* 221 U. S. 106, 31 Sup. Ct. 632, 55 L. ed. 663. The effect of these would seem to be that contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act, unless such restraint or interference is 'unreasonable' or 'undue.'

“ ‘Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs, which it was thought would flow from the undue limitation of competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reason-

ably forwarding personal interest and developing trade, but, on the contract, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy * * *

The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint. *Standard Oil Co. v. United States*, 221 U. S. 58-59-60, 31 Sup. Ct. 515, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912-D 734.'

"In applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* case that as the words 'restraint of trade' at common law and in the law of the country at the time of the adoption of the *Anti-Trust Act* only embraced acts or contracts or agreements or combinations which

operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was, therefore, pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.' *United States v. American Tobacco Co.* 221 U. S. 179, 31 Sup. Ct. 648, 55 L. ed. 663."

In *United States v. Reading Co.* 226 U. S. 324, 57 L. ed. 243-258, the Supreme Court re-states the rule as follows:

"That the act of Congress does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the *Standard Oil case*, 221 U. S. 1, 55 L. ed. 619. In that case it was also said that the words 'restraint of trade' should be given a meaning which would not

destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect."

In *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232-5, the Supreme Court again referred to the *Standard Oil* and *American Tobacco Company* cases, and said:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of interest of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

It will puzzle the most astute to bring the contract in the case at bar within the prohibition thus defined.

A contract creating an agency and providing for consignments for sale to the agent, does not disclose any such "intent" nor is its "inherent nature" calculated to unduly or otherwise restrict competition as forbidden by the Sherman law. Nor is there anything in this record from which the Court can conclude that competition has been **unduly restrained**, or restrained at all.

It is evident from the language of the law itself and from the numerous cases interpreting it that the object of Congress in the adoption of the Sherman law was not to prescribe the manner in which the individual should conduct his business—whether directly or through the agents chosen by him—but rather to forbid and prevent combinations between individuals who might otherwise be competitors, whereby that competition may be in any way restrained. It does violence to the language of the contract between the Ford Motor Company and its agents; it does violence to the manifest intent of regulating the manner in which the company's business should be conducted by its agents; it is a logical absurdity, to say that the contract in question is a contract in restraint of trade under the Sherman law.

It is on the contrary a contract whereby the Ford Motor Company seeks to obtain and secure the widest possible stable market, and the most satisfactory of all advertisements of any business—a body of satisfied customers who have reason to believe each one has received as fair and equitable treatment as any other purchaser of Ford automobiles.

As was said in *Whitwell v. Continental Tobacco Company*:

“If on the other hand it promotes or but incidentally or directly restricts competition while its main purposes and chief effect are

to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation." (And see authorities cited.)

No other automobile manufacturer has combined with the Ford Motor Company, but the Ford Motor Company competes in the open market with scores upon scores of other makers of automobiles and the purpose and effect of the contract under consideration is to make that competition as effective as possible and not to restrain it.

In the Whitwell case just quoted from, the Court used the following language which is persuasive in this case:

"The right of each competitor to fix the price of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition."

And again:

"The tobacco company, and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad

and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. * * * * * There is nothing in the act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200) which deprives any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade."

It will doubtless be claimed that from the fact that by the terms of the contract the Ford Motor Company received 85% of the list price of its automobiles and that is the maximum amount of **cash** it expected to obtain, it follows that there was actually

a sale to the agent and not a consignment, and this contention has been advanced notwithstanding the clear language of the contract and the agreement that either party might at any time, on notice, cancel the contract and the Ford Motor Company might take back the automobiles and return the 85%, and notwithstanding the other conditions of the contract by which both parties made clear their intention to enter into the relationship of principal and agent, with absolute control by the principal over all transactions in its behalf by the agent.

And there is nothing to impugn the absolute good faith of the contract.

But it is not true to say that the 85% was all that the Ford Motor Company expected to receive from the sale of its machines and the contract contains provisions for other considerations moving to the Ford Motor Company, considerations that from the standpoint of a manufacturer producing each year hundreds of thousands of automobiles are more important than the profit on sales brought about by any local agents.

With a produce of such magnitude the problem of reaching the market and obtaining customers, each one of whom must be induced to be a booster for the "Ford," is of far more importance than the mere percentage of profit on specific sales.

With a buying public, in the main ignorant of the qualities of the machine purchased, it is a matter of common knowledge that the popularity of different makes of automobiles depends mainly on the quality of the service given by the selling agents.

Automobiles of no special merit as compared with others selling at the same or lower prices have had a wide popularity because of the carefully cultivated belief of the public that owners of such machines are well taken care of and given good service by the representatives of the manufacturer wherever found.

On the other hand other makes of automobiles of equal or greater merit have been hopelessly condemned and the manufacturer driven into bankruptcy because of the failure of the manufacturer to secure that character of representation by agents that gives satisfaction to owners.

It is a truism that a "satisfied owner is the best advertisement."

To get this character of representation and secure this advertising as a basis on which to build future business of larger dimensions, is the real motive and consideration of the contract under consideration.

For these reasons the Ford Motor Company requires in its contracts with its agents that all

agents equip proper shops and be prepared to give, and to give "Ford Service" to Ford owners the world over, no matter where the particular purchase may have been made.

From the broad point of view of a manufacturer of a large and increasing product, looking to the future and a greater business, this is the one most important feature of the agency contract, and all else is subordinate to that and of minor importance.

For today only it might be easier to sell f. o. b. factory, and today the Ford Motor Company might be able to thus dispose of all its output.

But to build up and maintain and increase business, a broad, forward looking plan is needed, and of the contracts under consideration we can say, as was said in the case of *Whitwell v. American Tobacco Co.*, hereinbefore quoted from, that the "main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it."

When the contract is thus capable of a reasonable interpretation based on sound business principles, the only interpretation consistent with the language and intent of the contract, what justification can be found for going outside the record, into the realm of speculation and suspicion, to suggest a sinister purpose to evade a law, and based

on such assumed purpose, read into the contract a meaning of which the language is incapable, and therefrom draw the conclusion that the Ford Motor Company is conspiring with its own agent to violate the law, by restraining trade in its own product, for which it had supposed it was trying to obtain the widest market, through the heretofore lawful plan of controlling its own agents.

It is sometimes true that a court may "read between the lines" of a contract to enable it to get at the real intentions of the parties, but never is it permissible to disregard entirely "the lines" of the written contract and find a new and different contract in the blank spaces between the lines.

We, therefore, submit to the court that the contract of agency between plaintiff and the defendants, the Eugene Ford Auto Company, was a valid, reasonable and proper contract, entitled to be construed as made, and no evidence was introduced or offered tending in the least to impeach the good faith with which the contract was made.

We further submit that the court erred in taking plaintiff's case from the jury, and in holding that under the facts and circumstances of this case either demand or tender was required of plaintiff as a prerequisite to a recovery. *

We further submit that in any view of the case

the damages awarded defendants were unwarranted by the evidence and excessive, and based on erroneous instructions by the court.

Respectfully submitted,

PLATT & PLATT,

McDOUGAL & McDOUGAL,

Attorneys for Plaintiff and Appellant.

ALFRED LUCKING,

L. B. ROBERTSON,

HARRISON G. PLATT,

Of Counsel.

**United States Circuit Court
of Appeals
For the Ninth Circuit**

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,
vs.

E. A. FARRINGTON and L. A. HOUCK, co-
partners, doing business under the name
and style of PACIFIC TRANSFER COM-
PANY, J. DANIELS, H. SANDGATHE,
doing business as SPRINGFIELD GAR-
AGE, V. W. WINCHELL and F. M.
HATHAWAY, co-partners, doing business
under the name and style of EUGENE
FORD AUTO COMPANY, and A. WIL-
HELM and JOHN DOE WILHELM, co-
partners, doing business under the firm
name and style of A. WILHELM & SON,
Defendants and Appellees.

BRIEF OF DEFENDANTS AND APPELLEES

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON

CHARLES A. HARDY,
Eugene, Oregon
JOHN F. LOGAN,
Portland, Oregon
ISHAM N. SMITH,
Wallace, Idaho

Attorneys for Defendants and Appellees

MAY 12 1917

F. D. Monckton,
Clerk

United States Circuit Court of Appeals

For the Ninth Circuit

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,
vs.

E. A. FARRINGTON and L. A. HOUCK, co-partners, doing business under the name and style of PACIFIC TRANSFER COMPANY, J. DANIELS, H. SANDGATHE, doing business as SPRINGFIELD GARAGE, V. W. WINCHELL and F. M. HATHAWAY, co-partners, doing business under the name and style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, co-partners, doing business under the firm name and style of A. WILHELM & SON,
Defendants and Appellees.

BRIEF OF DEFENDANTS AND APPELLEES

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON

STATEMENT

Appellees desire to supplement the statement of the case made by appellant.

This is an action for claim and delivery under the Oregon statute brought by the plaintiff, a Michigan corporation, against Winchell and Hathaway, co-partners at Eugene, Oregon, and various parties who were agents of Winchell and Hathaway, and who are only nominal parties to the action. The facts out of which this cause of action arose, briefly stated, are as follows: Winchell and Hathaway were dealers in Ford automobiles at Eugene, Oregon, acting as such under contract with the plaintiff. While they had carried on this business for several years, contract with the plaintiff was made annually for a year at a time. The contract under which this controversy arose was made the 10th day of September, 1915, and expired July 31, 1916. Under the terms of the contract Winchell and Hathaway had agreed to take from the Ford Motor Company 286 Ford automobiles within the year, beginning September 15th, and ending July 31, 1916, and to pay the Ford Motor Company therefor \$374 for each Touring Car, \$331.50 for each Runabout and \$786.25 for each Sedan, besides \$53.25 freight from Detroit to Eugene on each automobile.

On the 24th day of May, 1916, Winchell and Hathaway had on hand thirty-seven Ford Touring Cars and one Sedan, for which they had paid Ford Motor Company \$16,077.50. This was the full amount that the plaintiff was entitled to receive from Winchell and Hathaway for the cars, and

it had to be paid in cash before the railroad company was permitted to deliver the cars to Winchell and Hathaway and no further sum whatever remained to be paid the plaintiff, but as has been shown the Ford Motor Company demanded, and received, from Winchell and Hathaway full payment in cash for each car at the time the railroad delivered it to them.

On May 24, 1916, when Winchell and Hathaway were in possession of thirty-seven Touring Cars and one Sedan, for which they had paid the plaintiff \$16,077.50 in cash, they received from the Ford Motor Company the following telegram:

“Portland, Oregon, May 24, 1916.

Eugene Ford Auto Company,

Eugene, Oregon.

Be advised that your contract is cancelled. The territory and your stock will be taken over by Vick Brothers, who will open a branch at Eugene.

FORD MOTOR COMPANY.”

The day following this telegram one Goden, representing the plaintiff, arrived at Eugene, Oregon, and informed Winchell and Hathaway that he had come to Eugene to take the Ford business away from Winchell and Hathaway and turn it over to a firm by the name of Vick Brothers. He said that Vick Brothers would take the automo-

biles, the garage business, consisting of stock, merchandise and accessories, and office fixtures; that these would be paid for at invoice price, or cost to Winchell and Hathaway at Eugene; that the Ford Motor Company would return to Winchell and Hathaway their deposit of \$800, which they had been required to deposit with the Ford Motor Company at the time of the execution of the contract; and that the Ford Motor Company would pay to Winchell and Hathaway a bonus, or rebate, on the amount of business they had done, including all cars purchased to date under the terms of the contract. (Tr. 218-219.) Mr. Goden also urged Winchell and Hathaway to accept this proposition, stating that he would not be surprised if they resented it, but it was the best thing for them to do; that the Ford Motor Company was a very large concern and would undoubtedly keep the matter in the courts for an unlimited length of time if this proposition was not accepted. This is the undisputed evidence in the case. (Tr. 219-220.)

This proposition was made verbally by Goden and Winchell and Hathaway said they would accept. Pursuant to this proposition Vick Brothers came to Eugene and started to invoice the stock, putting up \$1,000 as earnest money, and Mr. Goden went to Portland to report to the management of the Ford Motor Company.

Mr. Goden returned to Eugene a day or two

later, and when asked if he had come back with the money to close the deal stated that he had not and that obstacles had been found in the home office to carrying out this proposition. Goden thereupon stated to Winchell and Hathaway, and their attorney, Mr. Charles A. Hardy, that his company would not return the deposit money of \$800, nor would it pay the additional 5 per cent rebate on the amount of business done to date. (Tr. 221.) This interview took place in the hotel at Eugene at night, and Mr. Goden asked if Winchell and Hathaway would accept the money paid for the cars if it was tendered, and that he had the money available where he could get it out of the bank the next morning. Mr. Hardy then stated, speaking for Winchell and Hathaway, that they would take the matter under advisement. Mr. Goden then stated that the offer was withdrawn then and there. (Tr. 221-222.)

Thereupon, without demand or tender, this action of replevin was commenced, and the United States Marshal, armed with a writ of replevin, took possession of the automobiles, and the plaintiff took possession of their garage business and turned the same over to Vick Brothers. Such garage business consisted of a general garage, accessories and motor supply business, including oils and gasoline.

The evidence is undisputed that no demand was made upon the defendants for the possession of

the cars prior to the action and the seizure of the cars by the United States Marshal.

(Tr. 84.)

“Q. And you at no time, prior to the Monday that the Marshal took these automobiles, asked them for the automobiles in question?

A. No, I do—no.

Q. Made no demand upon them?

A. No.”

DEMAND

It is conceded in the brief of the appellant that no demand was made, and claimed that no demand was necessary.

TENDER

It is conceded in the brief of appellant that no tender was made Winchell and Hathaway of the \$16,077.50 paid by them to the plaintiff for the automobiles, and it is claimed on behalf of the appellant that no tender was necessary to entitle them to a recovery of the automobiles. In other words, the plaintiff claims that it was entitled

to the possession of the automobiles, and also entitled to retain the sum of \$16,077.50 paid the plaintiff by these defendants, which was the full value and the full price to be paid the Ford Motor Company for the cars.

The court directed the jury to return a verdict in favor of Winchell and Hathaway for the return of the automobiles, or the value thereof, and this is the principal error complained of by the appellants in this action. It was held by the court, and insisted here by the defendants, that the plaintiff was not entitled to maintain an action of replevin of the automobiles on the undisputed evidence in the case.

The evidence is undisputed that not only was the full payment and full value of the cars paid in cash by Winchell and Hathaway to the Ford Motor Company and that no further payments were to be made, but also that receipted invoices for the automobiles in question marked "Sold to Eugene Ford Auto Company, Eugene, Oregon. Terms strictly cash," were delivered to Winchell and Hathaway when the cars were paid for.

Not only did the plaintiff demand, and receive, from defendants full payment for the cars as delivered, but plaintiff gave to defendants receipted vouchers for each car as paid for, describing each car by its number, the material part of the voucher being in words as follows:

(Tr., pp. 206-212, inclusive.) (Defendant's Exhibit "F.")

<p>"Ford</p> <p style="text-align: center;">Ford Motor Company Portland</p> <p>Sold to Eugene Ford Auto Company, Eugene, Oregon.</p> <p>Charge same.</p> <p>Terms Strictly Cash.</p>	<p>Invoice</p> <p>Order date June 2, 1915.</p> <p>Shipped June 2, 1915.</p> <p>Customer's Order</p> <p>Contract Shipped via</p> <p>etc."</p>
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This form of doing business had been carried on between the Ford Motor Company and these defendants during the year 1914-15, and also during 1915-16, and never otherwise.

The plaintiff in this case contends that this transaction created a bailment and not a sale, for the reason that the Ford Motor Company specified the territory in which the cars were to be sold by Winchell and Hathaway, limiting the same; specified the persons to whom the cars should be sold, limiting the same; and specified the price at which Winchell and Hathaway were to sell these automobiles; and declared that for the purpose of enforcing these provisions of the contract that the

cars should be deemed the property of the Ford Motor Company until re-sold by Winchell and Hathaway. The appellant also claims, and devotes the major portion of its brief to the contention, that this contract is not in violation of the anti-trust laws of the United States.

POINTS AND AUTHORITIES

I.

It is conceded that Winchell and Hathaway were rightfully in the possession of the automobiles and had paid to Ford Motor Company the full purchase price in cash that was to be received by the appellant. Therefore, a demand was necessary before an action of replevin could be instituted or maintained, not only as a matter of procedure but as a condition precedent under plaintiff's own contract to the creation of its claim to procure from Winchell and Hathaway the automobiles in question. Under plaintiff's own contract, before it could claim the option to obtain the cars from Winchell and Hathaway, it must have first made a demand for the same. (Sec. 49 of the contract, Tr. 72.)

Albright v. Browne, 54 Ore. 599.

**People's Furn. Co. v. Crosby, 57 Neb. 282;
73 Am. St. Rep. 504.**

II.

The rule whereby a demand is unnecessary where the defendant contests a case on the merits, does not apply to cases where a demand is necessary, not only to render further detention by the defendant wrongful, but also to create in the plaintiff the right to possession.

**People's Furn. Co. v. Crosby, 57 Neb. 282;
73 Am. St. Rep. 504.**

III.

Plaintiff's own contract provides that it must return to the defendants the purchase money paid the plaintiff for the automobiles in question before it can obtain the automobiles from defendant, (Tr. 72, Sec. 49 of Contract) therefore, the tender of \$16,077.50 to the defendants was a condition precedent to the creation of a right to claim the right by the plaintiff to replevin the automobiles, otherwise the plaintiff would be entitled to keep the full price received from defendants for its cars and also have the cars.

**Freeman v. Trummer, 50 Ore. 287.
Latham v. Davis, 44 Fed. 863.**

IV.

The plaintiff alleged in its complaint that a de-

mand and tender was made, and with its amended complaint paid into the court the sum of \$3,401.12, claiming that this was the amount of the defendant's property in the cars. It now claims a tender would have been futile, but plaintiff prosecuted this case upon the theory that a demand and tender were essential, whereas in its brief it argues that they are unnecessary, but the rule of law, as we understand it, is that plaintiff cannot take one position in the trial court and an opposite position in the appellate court to secure a reversal.

**Western Union Tel. Co. v. Thompson, 144
Fed. 578, Pt. 4. (5 C. C. A.)**

V.

The delivery of the cars by the plaintiff to the defendant, upon payment of their full purchase price in cash, for the purpose of re-sale by the defendants to the public constituted a sale and not a bailment.

**Motion Pictures Patents Co. v. Universal
Film Mfg. Co., decided April 9, 1917, by
the U. S. Supreme Court.**

**Jesse Isador Straus v. Victor Talking Mach.
Co., decided April 9, 1917, by the U. S.
Supreme Court.**

(At the date of writing this brief these decisions were not published in any legal publication, but have been sent out by the Department of Justice to the officers thereof.)

VI.

The parties in dealing under the contract for two years treated it as one of sale and not of bailment, and the second further and separate answer and defense to the complaint (Tr. 10-11) is sustained by the undisputed evidence in the case.

This action of replevin was instituted to enforce a claimed contractual right and the contract itself is invalid.

**Clayton Act (Act of Oct. 15, 1914, Chap. 323).
U. S. Comp. Stat., Vol. 8, Title 56, Sec. 8820-
8836, p. 9606-9698.**

VII.

The identical contract was held invalid by the U. S. District Court for the District of Oregon and no appeal was ever taken from the decision.

**Ford Motor Co. v. Boone, et al. (Ore.) Bean,
J., decided about August, 1916.**

VIII.

The contract is within the condemnation of the Sherman Act, as amended by the Clayton Act, in the following particulars

First, its entire purpose is to permit the Ford Motor Company to sell its automobiles to its alleged "agents," make them pay in full cash upon delivery, and at the same time permit the Ford Motor Company to control and prescribe,

(a) The method of sale.

(b) The parties to whom sale shall be made.

(c) The territory limits.

(d) To fix the price of the sale.

(e) To penalize any dealer in Ford automobiles who violates any of its provisions by cancelling his contract and imposing a series of fines, or forfeitures, or losses, upon him regardless of damages which may or may not flow from such breach.

That these clauses are in conflict with the U. S. statutes relating to monopolies and combinations in restraint of interstate trade is plain from the following sections of those acts.

U. S. Comp. Stat. 1916, Ann. Vol. 8, Sec. 8835-a, p. 9680, Sec. 8835-b, p. 9681.

IX.

As the plaintiff seeks in this action of replevin to enforce a claim of contractual right under a contract void for conflict with the criminal laws of the United States the court should sua sponte dismiss its action and affirm the judgment.

Ah Doon v. Smith, 25 Ore. 89.

X.

DAMAGES

The contract itself permits the recovery of damages for the profits on the cars (Sec. 51, Tr. 73).

XI.

In an action of replevin whatever damages have been actually sustained may be recovered, and the defendants are entitled to recover all legal damages they have sustained.

Stevens v. Tuite, 104 Mass. 328, 335.

XII.

As the contract itself provides there shall be no

liability for damages asserted against the Ford Motor Company except as to matters pending, the profits on the cars that were taken would necessarily be a matter pending, and the plaintiff under its own contract would be liable for the loss of profits on the cars taken pursuant to its cancellation of the contract.

XIII.

The rule that damages which are uncertain or contingent cannot be recovered can not be applied to an uncertainty as to the amount of benefit or gain to be derived from performance.

Bredemeier v. Pacific Sup. Co., 64 Ore. 580.

XIV.

The taking of the automobiles deprived the defendants of their profit on the re-sale of the cars, and the defendants also show that the taking of the cars resulted in breaking up the business in which the defendants were engaged, thereby causing the defendants to lose—

1. The profits on the automobiles.
2. The use of their money invested in the business.

3. The breaking up of their general garage, motor supply and accessory business, which was an established business.

The evidence was received without objection as to these damages, and the damages were the direct and proximate result of the wrongful taking of the cars. Evidence of these elements of damage was received without objection, and the amount of damages was properly submitted to the jury under the instructions of the court.

XV.

The amount of damages awarded was \$6,000. It is conceded in the brief that the profits on the automobiles taken, at the price fixed by the Ford Motor Company, would amount to \$2,477.75. The undisputed evidence is that the garage business was making a profit of \$300 per month. The appellant in its brief figures that the damage for the loss of the business should be limited to \$300 per month from the time of the commencement of the action to the date of trial, and amounting in the aggregate to \$1,030, leaving \$3,507.75 in dispute. Appellant therefore concedes that the verdict for damages is fully sustained, except as to \$3,507.75, and therefore we say the judgment should be affirmed and the only question involved is whether we should remit the \$3,507.75 or not.

We insist that loss of our business, paying a profit of \$300 per month, and the evidence that we were prevented from engaging in any other business because of the fact that our entire capital was invested in the cars taken, made the question of amount of damages a question of fact for the jury, and that the amount awarded is not excessive.

ARGUMENT

DEMAND AND TENDER

Points I, II, III and IV will be considered together. They relate to the necessity of a tender to the appellees of the sums paid by them to the appellant for the machines before they took such machines into their possession. This was the full price—the extreme value in the original sale from the appellant to the appellees.

The contract says (Tr. 72, Cl. 49):

“In case of the cancellation or expiration of this contract the first party may, at its option, retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment unsold at the date of such cancellation or expiration, at the **same time returning to him his ad-**

vancements on the said automobiles.”

By the contract the Ford Motor Company, having received from its “agent” the full purchase price of the machines, stipulated that the agent should have possession thereof until

(a) The contract was either cancelled or had expired, and

(b) The “advancements” made by the agent were returned to him.

It is plain that the Ford Motor Company had **no right** to claim the possession, or to institute proceedings to obtain possession of the automobiles for which it had been fully paid until it had first tendered back the sums so paid by its agents to it. This tender is a condition precedent to the establishment of the right.

Freeman v. Trummer, 50 Ore. 287 (292, 293).

Otherwise, the Ford Motor Company would be entitled to keep the full purchase price of the machines and also recover the machines. (See cases under Points I and II heretofore.)

Like argument demonstrates the necessity for a demand.

Appellant does not contend that it made either a demand or a tender within the meaning of the contract before instituting this suit, and the judgment against it should be affirmed on these two points alone.

The cases holding that a demand is not necessary are those wherein the original possession was wrongful, but here it is conceded the appellees were rightfully in possession. Counsels state that whatever the rule may be elsewhere that the Supreme Court of Oregon has said in *Brown v. Truax*, 58 Ore. 572:

“Where the defendant in his answer claims title to the property no proof of demand is necessary.”

In the case of *Brown v. Truax*, upon which counsel relied, the Supreme Court of Oregon expressly bases its decision on the fact that the possession of the defendant was under all circumstances wrongful. The Supreme Court of Oregon squarely holds, in the case of *Albright v. Browne*, 55 Ore. 599, where the answer denied the allegations of the complaint and averred that the defendant was the owner of the property described, “It was essential to aver and prove a demand for the goods, but having failed to do so a non-suit was proper.” The leading case on the question is *People’s Furn. Co. v. Crosby*, 57 Neb. 282, 73

Am. St. Rep. 504, and this authority is quoted by all the text writers who speak upon the distinction, where a demand is necessary not merely to lay the foundation for a remedy but to complete a right of possession in the plaintiff. When a demand is necessary to complete a right of possession in the plaintiff, the defendant by claiming title does not waive such requisite thereto.

In the instant case the appellees were rightfully in possession and not merely as a matter of procedure, but in order to create claim of right under the contract the appellants were required to make a demand and it was a condition precedent to the **existence of a cause of action.**

Counsel argues that no tender was necessary on the theory that a tender would have been futile. The evidence shows, not only that no tender was ever made, but that when the appellees were asked whether or not they would accept a tender if offered, and answered that they would take the matter under advisement, they were then and there told the offer was withdrawn.

(Tr. 179.)

“Q. You simply told them the money was there and you could give a check the next morning, and I told you we would take it under advisement, didn’t I, and you said the offer was withdrawn, didn’t you?

A. I told you at the time, speaking to you at the time, as far as you were concerned, the offer was withdrawn. I was talking to Hardy."

(Tr. 180. By Mr. Hardy.)

"Q. When I told you we would take the matter under advisement, didn't you then and there say the offer is withdrawn?"

Answer by Witness Goden, plaintiff's agent, "I said, 'No advisement in this case so far as you are concerned.' The offer is withdrawn. That was you.

Q. As the three of us walked out of the room didn't you follow us out of the room and repeat

'The offer is withdrawn,' shaking your fist?

A. I have no recollection of that. I had no reason for shaking my fist."

(Tr. 221. Direct examination of V. W. Winchell.)

"Q. What was then said?

A. Mr. Goden then asked us—I believe the

next thing in the line of succession was that Mr. Goden asked us if we would accept this money if it was tendered, and our attorney, Mr. Hardy, told him we would take it under advisement. I distinctly remember Mr. Goden at that time saying that the offer was withdrawn then and there, and as Mr. Hardy repeated—Mr. Hardy has told you before, Mr. Goden repeated again in the hallway, 'The offer is withdrawn.'

Q. Did you see him any more after that with respect to this matter?

A. I believe the next time that we saw Mr. Goden was at the time that the cars were replevined by the United States Marshal.

Q. Did Mr. Goden, or anyone else, ever tender you either cash, check or draft, or anything else for this money?

A. No, sir.

Q. Or any money?

A. No, sir.

Q. And did he, or anyone else, make any demand on you for the cars?

A. No, sir."

This evidence is the undisputed evidence in the case, and we submit that it is begging the question for counsel to claim that the appellees had ever said or done anything that would render a tender futile; furthermore, the only tender made by the appellants is the tender of \$3,401.12, and this was tendered after the action was commenced and the cars taken, and this amount of money paid into court with their amended complaint. (See Par. 7, Amended Complaint, p. 6 of Tr.) No money was tendered into the court with the original complaint, and no tender was pleaded. The Amended Complaint having been filed the original complaint goes out of the case and becomes *functus officio* as a pleading.

The appellant brought into court the sum of \$3,401.12 and admits that the amount paid by the appellees to the appellant was \$16,077.75, which sum they were required by their contract to tender back before having any right whatsoever; furthermore, the appellant brought into court, on the theory that it must bring into court some sum of money, the sum of \$3,401.12 only, and alleged that this was the amount it was ready to pay defendants, and also alleged (Amended Complaint, par. 7, Tr. 7) "which amount is the defendants', Winchell and Hathaway's, property in said cars at this time."

The Amended Complaint was filed August 14,

1916, long after the action was instituted. In view of this pleading it does not lie in the mouth of the appellant to say that it was excused from making a tender on the theory that a tender would have been futile.

INCONSISTENT POSITIONS

The Amended Complaint was framed upon the theory that demand and tender were both necessary, the Amended Complaint alleged both, plaintiff sought to keep "a" tender good by depositing the sum of \$3,401.12 with the court when the Amended Complaint was filed, it recognized the force of the positions above argued and tried its case upon the theory that it had made both a tender and demand. It injected these issues into the case, there is no allegation excusing either, whereas on this appeal it seeks to evade both the tender and demand by arguing that neither is necessary.

At the time the Amended Complaint was filed the Answer of defendants had been on file many weeks, and if the Answer was sufficient to excuse both a tender and demand, then appellants would not have alleged either in their Amended Complaint.

It is well settled that a party to a lawsuit cannot thus take inconsistent positions, nor can he

mislead the trial court by trying his case upon one theory and procure a reversal upon a different theory.

Western Union Tel. Co. v. Thompson, 144 Fed. 578, Pt. IV.

Long v. Lockman, 135 Fed. 179 (199).

**Brooks v. Laurent, 98 Fed. 647, 654.
The New York.**

Smith v. McAllister, 113 Fed. 810 (811).

**Pollitz v. Wabash Ry., 167 Fed. 145, Pt. V,
discussed p. 164.**

**Seminole Securities Co. v. Southern Life Ins.
Co., 182 Fed. 85 (94-95).**

Davis v. Wakelee, 156 U. S. 680 (39:578).

DAMAGES

The jury returned a verdict of \$6,000 damages, and the appellant claims that the court erred in instructing the jury that they might take into consideration, in arriving at their estimate of the damages suffered by the defendants because of the wrongful taking of the cars, first, the profits which

the defendants might have earned by the re-sale of the automobiles replevined. The profits to be derived under plaintiff's own theory were not contingent or speculative, the plaintiff claiming that there was a ready sale for all Ford automobiles at a retail price of 15 per cent over the amount paid the plaintiff by the dealer. The evidence is undisputed that Winchell and Hathaway could have sold all of these cars at a profit of 15 per cent. The appellant is bound by this proposition for the reason that it has fixed the amount of profit itself that the dealer is supposed to make at 15 per cent, and thereby fixed the value of the machine to the dealer.

The appellant bases its argument that no recovery should be had for the wrongful taking of the cars on Par. 51 of its contract, which provides that the second party shall have no claim to commission or damage, notwithstanding transactions may thereafter take place with, or sales be made to parties with whom the second party shall have dealt during the currency of this contract. All this means is that if the Ford Motor Company itself should sell automobiles at the termination of the contract to parties with whom the dealer had previously been negotiating, then the dealer should have no claim to a commission on the transaction or for damages.

This provision of the contract expressly excepts

matters pending at the date of the termination of the contract. This provision of the contract does not purport to go further than to permit the Ford Company to itself sell cars to prospects that the agent had, and to whom he might have sold cars had the contract not been terminated.

In other words, at the time of the conclusion of the contract the agent might have demonstrated the car to several hundred people, whom he had listed as prospects, or with whom he had negotiated, and under the termination of the contract the Ford Company might come along, find these people and sell them automobiles and all that the contract provides for is that it shall not be liable in such event for commissions or damages.

This provision of the contract in no way precludes the dealer from claiming damages for cars that he had bought and paid for, and which belonged to him, and which he might have sold had not the Ford Motor Company wrongfully seized the same, but on the contrary expressly excepts **matters pending**.

This is a sufficient answer to the contention that the dealer was not entitled to damages for the profits he would have made on these machines had they not been wrongfully taken from him.

This item of the damages is figured by the ap-

pellant at \$2,477.75, and the appellant in its brief concedes that this is the absolute fixed profit that would have been made by the dealer from the sales of these cars alone had not they been wrongfully taken from him.

It is also claimed (Assignment of Error No. 3, Tr. 35) that the court erred in submitting to the jury whether or not the taking of the thirty-seven automobiles destroyed or injured the business in which the defendants were engaged. The defendants pleaded the injury and destruction, and their claim for damages on account thereof, due to the wrongful taking of the automobiles and evidence of the fact of the destruction of defendants' business and the consequent damage, was offered and received without objection on the part of the appellant.

Commencing at page 230 of Transcript of Record, to the commencement of the Cross-Examination on page 234, the testimony of the defendant Winchell as to the destruction of the defendants' business was received without any objection whatever, and the witness was cross-examined on the same questions. There was no objection whatsoever to the testimony of this witness on the question of the damages, and it was shown by this witness that the business of the defendants was paying them at the rate of \$300 a month, and that

the same was destroyed as a result of the wrongful taking of the automobiles, because at the very time that the plaintiff cancelled the agency and replevined the cars they were undertaking to require the defendants to turn over their general garage and motor supply business to Vick Brothers, and as a result of their action in this respect the entire business of the defendants was destroyed.

Likewise, the testimony of the witness Hathaway to the same effect was received with only one objection on the part of the appellant (Tr. 262-263). This objection was made to the question as to whether or not the defendants had any other opportunities to go into business during the time between the taking of the cars and the trial of this action, and the basis of the objection as made was that this would not tend to show damage. The testimony was received on the theory that the capital of the defendants was tied up in these automobiles, and when they were taken by the plaintiff and the plaintiff at the same time retained the \$16,077.50 that they had received from Winchell and Hathaway, all of the available capital of Winchell and Hathaway was tied up so that they were unable to go into any other business (Tr. 263). The appellant then thoroughly cross-examined witness Hathaway on the question of the profits of his business and his opportunities to go into business; then on re-direct examination, and after

witness Hathaway had testified without objection, and after the witness Hathaway had been cross-examined on the question, on re-direct examination in response to the matters brought out by the appellant through his cross-examination, the witness Hathaway was permitted to testify further in regard to the matter (Tr. 282, 283, 284, 285). All without any objection whatsoever on the part of appellant.

On page 262, of Transcript of Record, and without any objection whatsoever, the witness Hathaway likewise testified that the damage suffered by the defendants on account of the destruction of their business, caused by the plaintiff's wrongful seizure of the cars, was a matter of \$300 a month, which the business was then paying as a profit to Winchell and Hathaway.

After trying the case on the theory that these damages flowed from the wrongful taking of the cars, and after the testimony was offered and received without any objection whatsoever on the part of appellant, appellant now claims for the first time, and on this appeal, that these damages were not recoverable in this action.

Likewise in this case they tried to minimize the damage by offering evidence on the same question themselves in undertaking to show that de-

fendants had voluntarily sold the garage business to Vick Brothers. Appellant failed to prove a voluntary sale to Vick Brothers, for the evidence disclosed only an executory contract which was a part of the proposed deal offered by the plaintiff in the first place, when the agent Goden offered to pay the defendants the price of the cars, plus bonus or rebates and deposit money, and then afterwards the plaintiff refused to carry out this proposition and the transaction was not completed through the fault of the plaintiff.

How can the plaintiff, after making no objection to the testimony offered on the part of the defendants and then offering evidence on the same question itself, come before this court on an appeal and claim any error on the part of the court in submitting this very question of the amount of such damages to the jury? Furthermore, the appellant did not ask the court to take this evidence from the jury nor did it offer any appropriate instruction or request any appropriate instruction taking it from the jury, but on the contrary asked the court to instruct the jury that the damages be limited to \$1,000. (Request No. 7, Tr. 117.) The appellant also made a request that no damages whatsoever be allowed, but this is inconsistent with its request that the damages be limited to \$1,000, and after the evidence was received as to damages without objection the appellant was in no position

to ask the court to instruct the jury that no damages whatever should be allowed for the wrongful taking of the cars; **consequently we find that the records show that the appellant is raising the question as to the elements and items of damages for the first time on this appeal.**

The appellant also claims in its brief, though it did not claim it at the trial of the case, that while the uncontradicted evidence, received without objection, shows that the defendants' business which was destroyed by the plaintiff was paying a profit of \$300 a month, that the court should have limited this from the time of the commencement of the action up to the date of trial, thereby limiting it in amount to the sum of \$1,030. **No such suggestion was made at the trial in any manner whatsoever; BUT ON THE CONTRARY THE APPELLANT REQUESTED INSTRUCTION NO. XI, AND CITED ITS REFUSAL AS ERROR.** That instruction reads (Tr. 37, Error No. 4):

"The burden is upon the defendants to prove by a preponderance of the evidence, that the automobiles here in question are of the value they allege, namely \$18,555.25, and that they have been further specially damaged in the sum of \$25,000, and unless defendants do convince you by a preponderance of the evidence, to this effect, then they have failed and your verdict should be against them."

Bearing in mind that the appellant itself requested this instruction, how can they complain when the court substantially gave the instruction, for the court instructed the jury (Tr. 122, 123) that the burden of proof was on the defendants to prove these very damages and the court gave the very instruction requested by the appellant, using substantially the same language as the request was framed in, but amplifying it, and gave the instruction in a more conservative form than asked for by the appellant?

In other words, the court protected the appellant from the extent and generality of damages which it requested him to instruct upon.

Upon this appeal will the court permit the appellant to claim reversible error based upon its own request? It is fundamental that invited error can never be assigned for reversal.

ANTI-TRUST ACTS

Appellant seeks to inject the construction of their contract under the Anti-Trust Acts, commonly known as the Sherman Act, with its amendments, and the Clayton Act of October 15, 1914. This is not in the case as tried and the court expressly ruled it out.

(Tr. 306, 307.)

“COURT: The other issue is the amount of damages if any the defendants suffered by reason of taking these cars?

MR. SMITH: Yes, your Honor, that is one issue, and another matter, in order that we may know how to present it to the jury. The whole case as we view it falls under the Anti-Trust Laws of the United States. Now, in our answer there is a prayer for and an asking for punitive damages.

COURT: I think you can pass that, for I don't think there is any evidence on which to base it.

MR. SMITH: Then we thought the case would fall under the Clayton Anti-Trust Act instead of under the common law, and being under the Clayton Act we ask for single damages. * * *

MR. SMITH: I understood your honor to rule this case came under the Clayton Act.

COURT: No, I made no ruling. I don't think it is material in this case whether it comes under one act or the other.

MR. SMITH: No ruling. Will the plaintiff

have the opening and closing on our defenses, or will we have it?

COURT: They will have it."

The defendants, and appellees herein, requested the lower court to rule this case under the Clayton Act, but the court refused to do so; and this ruling is not assigned as error and no exception was taken to the ruling.

With the record in this condition appellant seeks to inject the construction of its contract, asking this court to determine whether it is violative of the trust and monopolies statutes of the United States, although it was expressly stated at the trial and its elimination was not excepted to, nor is it embraced within the assignments of error and its elimination was in favor of the appellant.

We firmly believe that the appellant is seeking to inject the construction of the contract to ascertain its validity under the Anti-Trust Laws of the United States solely for the purpose of attempting to predicate some ground for a review in the Federal Supreme Court when this judgment is affirmed by your Honors. We do not concede that the construction of this contract, or its validity when tested by the Anti-Trust Laws of the United States is properly involved, or involved at all, in this

appeal, but if this court should consider that it is so involved then we respectfully contend that the contract is expressly violative of those acts within the meaning of the cases heretofore cited, because it attempts—

1. To place a territorial restriction upon the power of every selling agent;

2. To fix the price of re-sale of these articles, and hence is in direct restraint of trade;

3. To provide punishments, forfeitures and damages for violation of any of its provisions;

4. To dictate the persons to whom the “selling agents” may transfer the cars for which they have already fully paid.

Appellant argues that the Ford automobile is a patented article, but the patent laws of the United States do not in any manner confer the right upon a patentee to violate the criminal statutes invoked against the creation of trusts. And in

Motion Picture Patents Co. v. Universal Film Mfg. Co., decided April 9, 1917, by the Federal Supreme Court;

Straus v. Victor Talking Machine Co., decided April 9, 1917;

the invalidity of contracts similar, and for the same purpose as that at bar, was clearly settled. It was there stated that the object of the patent laws is to give "to the inventor the exclusive use of just what his inventive genius has discovered."

Does appellant contend that the inventive genius of Mr. Ford reaches to the stifling of competition and restraint upon interstate commerce in violation of the plain letter of the Anti-Trust Laws? Does it argue that the restriction of re-sale of a patented article is a part of the inventive genius of a man who makes an engine?

It might be that Mr. Ford is the only man who ever patented a device to convince people that walking is a pleasure but that isn't the basis of the complaint of appellant.

We respectfully submit under the authorities heretofore cited that the contract involved is clearly violative of the Anti-Trust Laws of the United States and for that reason the plaintiff has no standing in this court.

SALE, NOT A BAILMENT

In the answer in this case it is alleged that under the entire course of dealing between plaintiff and defendants under the contract involved,

the transaction was treated by both parties as a sale and not a bailment. The undisputed evidence shows that the cars were in fact sold to Winchell and Hathaway and there was no bailment. Therefore the judgment necessarily must be for the defendants for manifestly the plaintiff could not replevin the cars to which the title was rightfully in Winchell and Hathaway. The plaintiff did not claim these cars by right of repurchase, but on the theory that the title had never passed, and that is appellant's position in its brief before this court.

The defendants both testified that they paid Ford the full purchase price to be paid for the automobiles upon delivery of the cars and that during three years of dealing under this form of contract this manner of doing business was never varied. No evidence was offered to dispute these facts. (Note the testimony of the defendant Winchell, Tr. 224.)

“Q. From 1915 to 1916 did you ever pay any further price than the price they were invoiced to you at?

A. No, sir.

Q. And you received the cars?

A. Yes, sir.

Q. And sold them in the course of business?

A. Yes, sir."

(Testimony of defendant Hathaway, Tr. 261.)

"Q. Now, Mr. Hathaway, in all the years you have dealt with them has there ever been a time, a single instance, but what you have had to pay for the car on delivery to you?

A. No, we only pay the one price.

Q. And you pay that on delivery of the car?

A. Yes.

Q. And you treat the car as yours and go on and sell it or dispose of it as you like?

A. Yes, sir.

Q. You have done that for three years?

A. Four, yes, I was with the Ford Motor Company.

Q. Were you ever called upon to pay any further price than the price you paid on delivery?

A. No, sir.

Q. In all the 437 cars that you sold at Eugene did you ever pay a cent extra over and above the price you were required to pay to get the cars?

A. No, sir.

Q. Were you ever asked to?

A. Never asked to.

Q. Did they ever claim anything different?

A. No, there was nothing."

All of this evidence was received without any objection and no witness in the case disputed it. How then can it be claimed that the cars were held under a bailment instead of an actual sale? It is inconceivable that the Ford Motor Company could deliver the cars to Winchell and Hathaway to be sold by them to the public in the ordinary course of trade, and delivered to Winchell and

Hathaway only upon full payment to Ford of all that they were to pay for them and the payment made in cash, and this be construed to be a bailment or anything else other than an outright sale.

This case has no relation to the Cole Motor Car case cited by the appellant in its brief, or any of the cases cited by it in which there was an actual bailment and not a sale. To call a sale a bailment does not change the character of the actual transaction, but its true character is to be determined—

(a) From the language of the governing contract;

(b) More especially from the course of dealing which both parties have adopted under it and where that course exists for a large number of years and is acquiesced in by both parties it is conclusive of the nature of the transaction.

In addition the appellant at Assignment XI assigned error in giving the following instructions:

“It also appears in testimony that at that time the defendants had in their possession some thirty-seven cars, which they had previously ordered from the plaintiff, upon which they had paid 85 per cent

of the list price, or all that they were expected or required to pay under the contract.”

In specifically designating the pretended error in this instruction appellant used this language, in Transcript of Record, p. 42:

“For the reason that it appears from the face of the contract introduced in evidence upon the trial of the above entitled case, which contract was admitted by all parties, that the 85 per cent of the list price was only a portion of the consideration which the plaintiff and purchasers of its cars was to receive from the defendants in this case, and for the further reason that it was provided under and by virtue of the terms of said contract that upon the cancellation thereof the plaintiff might exercise its option to retake possession of the cars in controversy upon returning the 85 per cent advanced, and in event of its failure to exercise such option the defendants would make every reasonable effort to sell such cars within three months after the cancellation of the contract, and in the event of their inability to accomplish such sale said defendants would be entitled to purchase said automobiles by the payment of 10 per cent additional upon the list price and would have a lien upon the automobiles for the 85 per cent advanced.”

The theory of the case of appellant is that a

tender was unnecessary, therefore it could replevin the cars and deprive the defendants of the right of sale, which it has done. At no place does it ask for the additional 10 per cent, nor does it say that it left the cars in the possession of the defendants for sale after the termination of the contract, therefore its own contention shows that it has been paid every cent to which it is entitled when it received the original sale price, and that it never tendered that back as a basis for the creation of a right of possession in appellant.

FRIVOLOUS APPEAL

We have shown the following facts:

1. The defendants were rightfully in possession of these machines;
2. They paid the plaintiff its full purchase price before they took possession;
3. The plaintiff retook these machines by a writ of replevin without tendering back to defendants the sum which defendants had paid to plaintiff therefor;
4. No demand for their possession was made,

although the machines were rightfully in defendants' possession;

5. The question of the construction of the contract under Anti-Trust Laws was expressly ruled out of the case and the appellant took no exception to the ruling, nor did it assign it as error;

6. The instruction given concerning damages was more in favor of appellant than that which appellant asked;

7. The undisputed evidence shows a sale and not a bailment;

8. Even if the validity of the contract when tested by the Anti-Trust Laws is involved, its invalidity was established by a long line of cases decided long prior to the trial of this present case.

For all these reasons we assert that there is no bona fide question involved in this appeal and that it should be dismissed with the penalty provided, and especially do we urge this because the undisputed evidence of Winchell and Hathaway shows that Goden threatened them with prolonged and continuous litigation by appellant, which he asserted would use its vast wealth to keep any case which they might have with the Ford Motor Company in the courts indefinitely. (Tr. p. 255.)

We, therefore, respectfully submit that this is

a proper case in which to impose a penalty for a Frivolous Appeal.

Respectfully submitted,

CHARLES A. HARDY,
Eugene, Oregon,

JOHN F. LOGAN,
Portland, Oregon,

ISHAM N. SMITH,
Wallace, Idaho,

Attorneys for Defendants and Appellees.

Due service by requisite number of copies hereby admitted this — day of May, 1917.

Attorney for Appellant.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-
partners, doing business under the name
and style of PACIFIC TRANSFER COM-
PANY, J. DANIELS, H. SANDGATHE,
doing business as SPRINGFIELD GAR-
AGE, V. W. WINCHELL and F. M.
HATHAWAY, co-partners, doing business
under the name and style of EUGENE
FORD AUTO COMPANY, and A. WIL-
HELM and JOHN DOE WILHELM, co-
partners, doing business under the firm
name and style of A. WILHELM & SON,
Defendants and Appellees.

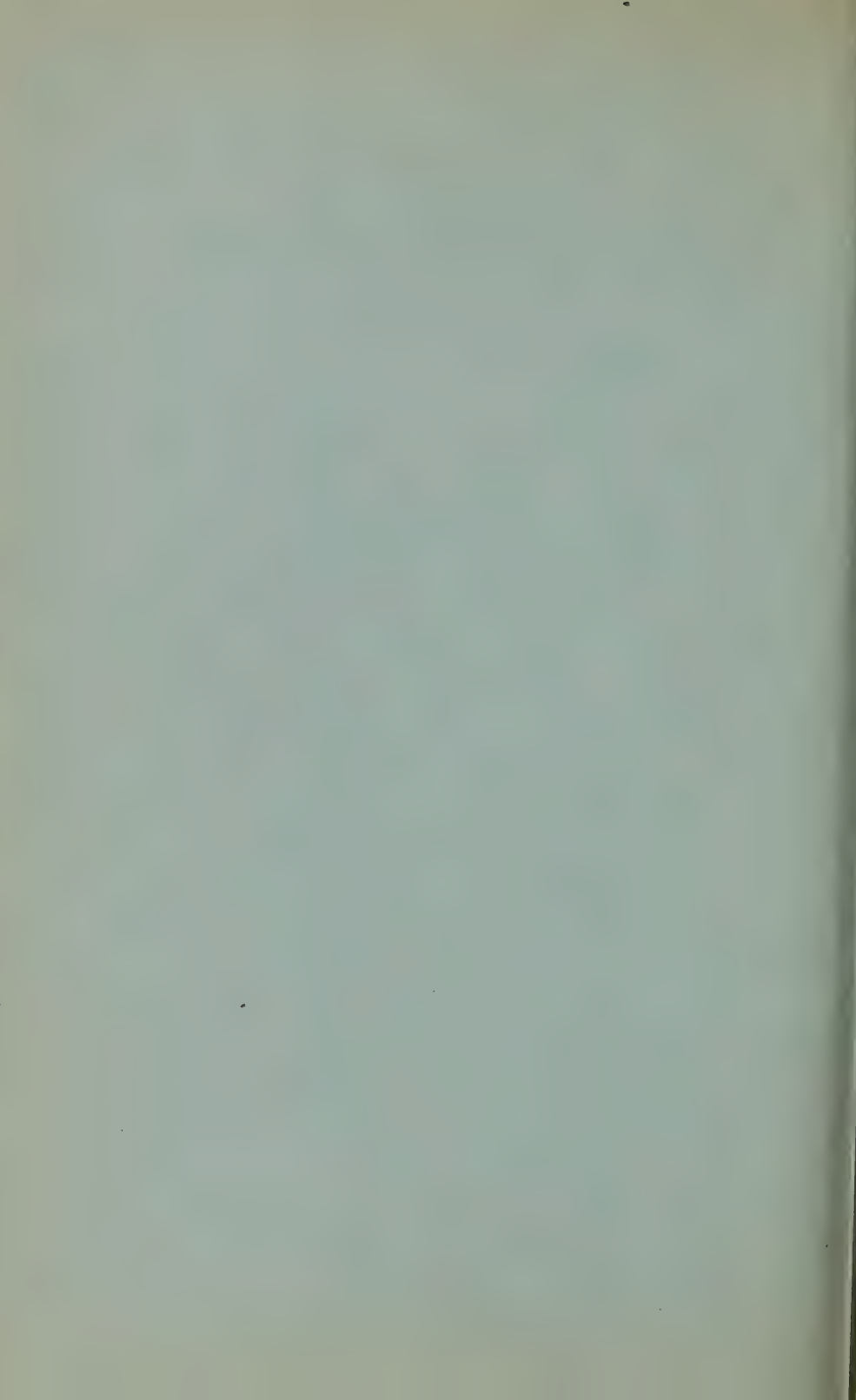
PETITION FOR REHEARING

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON.

PLATT & PLATT,
McDOUGAL & McDOUGAL,
Attorneys for Plaintiff and Appellant.

ALFRED LUCKING,
L. B. ROBERTSON,
HARRISON G. PLATT,
of Counsel.

FILED
JUL 29 1917



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name and style of A. WILHELM & SON,
Defendants and Appellees.

PETITION FOR REHEARING

The plaintiff and appellant, at this time, peti-
tions the court for a rehearing and a reconsidera-
tion of the above entitled cause, and respectfully
submits that the opinion written by the court dis-
closes that the court has overlooked some of the is-
sues upon which the case was submitted to the court,
and some of the evidence introduced, and has taken

for granted some things which the evidence does not support.

The appellant urges a reconsideration of the cause upon the merits, and will also contend at this time that the trial court had no jurisdiction to try the cause.

THE MERITS OF THE CASE.

The printed record in this case contains 320 pages, and appellant submitted a brief of over 150 pages. Perhaps on account of this voluminous record, we respectfully submit that the court has lost sight of some of the material issues upon which the case was tried and some of the facts established on the trial.

This court seems to us to have followed the trial court wherein it assumed, and instructed the jury, that the defendants were entitled to recover, because of plaintiff's failure to make any demand for the return of the cars replevined, or to make a tender of the advances made by the defendants to the plaintiff pursuant to the contract under which the cars had been consigned by the plaintiff to the defendants. Both courts have held that under the contract of consignment, plaintiff retained title to the consigned cars until they were sold to users, and that

the plaintiff was entitled to, and did, cancel the contract in accordance with the provisions thereof. As this court, in its opinion has said:

“In case of a cancellation of the contract, the plaintiff had the right to retake the unsold cars, at the same time repaying to the consignees the full amount of their advancements. When the notice of cancellation was given, the defendants had on hand 37 of the cars so consigned, on account of which they had advanced the aggregate sum of \$16,077.50, including freight charges. A day or two following the notice, one of the plaintiff’s representatives visited the defendants at their place of business, and after discussing with them matters relating to the closing up of the contract and turning over the cars, he went to Portland to advise with his superior.”

We pass at this time the obvious inference from this statement that there must have been at that interview a request for the return of the cars, with the remark that we do not understand that a demand has to be couched in any precise form of words.

Thereupon, the opinion of the court, after alluding to the apparent regrettable lack of courtesy on the part of plaintiff’s representative shown toward the counsel for the defendants, states that—

“A few days later, on June 3rd, the suit was commenced without first making any formal demand for the cars, or tendering the \$16,077.50, which the defendants were entitled to receive.”

In making this statement, which is apparently the premise upon which the court's opinion is based, we respectfully urge that the court, perhaps by reason of the excessive length of the record, has fallen into a misapprehension of the issues tendered and the facts developed upon the trial. Had the defendants merely stood upon the lien secured to them by the 13th paragraph of the contract, their possession of the property, thus asserted, would have been a rightful possession, subject to termination by the plaintiff only by compliance with the provisions of the contract.

But the defendants were not satisfied to admit the ownership of the plaintiff in the property, claiming a lien thereon, or that, as the court has said—“under the contract the plaintiff retained title to the consigned cars until they were sold to users.” By their answer, they denied that plaintiff had retained the title to the property until sold, or that it was entitled under any conditions or circumstances to a return of the property, and the defendants asserted an ownership in themselves, absolute and exclusive, inconsistent with any claim of lien. And the defendants re-asserted and reiterated in varying forms in

four further and separate answers and defenses, this claim and defense of ownership. And this claim that the property replevined had been sold by the plaintiff to defendants and was their absolute property is repeated in the evidence and finally in the defendants' brief in this court. The defendants plainly and clearly went to trial upon a claim of absolute ownership in themselves, and repudiation of any right on the part of the plaintiff in the cars, or any right of possession thereto. The theory of the law in insisting upon a demand where a possession is rightful and ownership admittedly in the party making demand, is that, upon proper demand, defendant will surrender possession, and that he ought not to be held for failing to surrender possession unless asked so to do. But defendants in this case have made it abundantly clear by their position upon the trial that they would not have yielded possession under any circumstances, and that the omission of demand, if there was an omission, which we do not concede, in no way changed their attitude.

The purpose and effect of a demand for possession is to convert a rightful holding and possession by a defendant into a wrongful detention, by a refusal to comply with the demand. Where a defendant's possession is wrongful, or based upon an absolute denial of any right in the plaintiff under any circumstances to retake possession, the law does not require so futile a thing as a demand, and likewise

it is an unnecessary and futile thing to prove a demand when the defense is based on a denial of plaintiff's right to possession under any circumstances. The defense asserted converted a rightful possession into a **wrongful detention**. We refer again to that decision of the Supreme Court of the State of Oregon, where this case arose, wherein it is said:

“Moreover the defendant in his answer claims the title to the property, and where such is the condition of the pleadings, no proof of demand is necessary.”

Brown v. Truax, 58 Ore. 572, 577.

This matter was discussed in our original brief, beginning at page 59.

But we do not need to rely upon the fact that the defendants, by choosing as their ground of defense the claim of absolute ownership in themselves with its consequent repudiation of any claim or interest on the part of the plaintiff, rendered unnecessary proof of demand, and we respectfully urge that the premises on which the court's opinion seems to be based, following the action of the trial court in taking from the jury consideration of the questions of demand and tender, rest upon a failure to consider all the evidence introduced in the case.

The testimony clearly indicates both a demand and a tender.

One of the defendants testified (Abstract, page 257):

"A. Well, he said that could be taken care of afterwards. He says, 'I can't say, you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind.'

"Note the language of the defendant where it said—'**Well, we told him that we couldn't consider a proposition of that kind.**' Here in this quotation and in the testimony from which it is taken is a positive refusal to accept the 85 per cent unless other sums were paid at the same time.

Again on pages 268 and 269, Transcript of Record, we find further evidence by one of the defendants himself of a tender and a positive refusal.

Q. And what did he say they would do?

A. They would pay us the 85 per cent of the selling price or list price of the Ford cars—these cars that were in question.

COURT: That is, they would return to you

the money you had paid on the cars—was that it?

A. Yes, sir.

Q. And you refused to accept that?

A. Yes, sir."

IS IT POSSIBLE TO READ THIS TESTIMONY OF A DEFENDANT, AND BELIEVE THAT HE DID NOT UNDERSTAND THAT PLAINTIFF'S REPRESENTATIVE WAS OFFERING HIM \$16,-077.50, AND THAT HIS REFUSAL TO ACCEPT WAS BECAUSE, AND ONLY BECAUSE, HE WAS DEMANDING OTHER SUMS OF MONEY OR OTHER CONDITIONS TO WHICH, UNDER THE CONTRACT, HE WAS NOT ENTITLED?

AND, FURTHER, AS A REASONABLE PROPOSITION, IS IT POSSIBLE TO BELIEVE THAT THE PLAINTIFF'S REPRESENTATIVE WAS OFFERING TO PAY TO THE DEFENDANT \$16,-077.50 WITHOUT ASKING RETURN OF THE CARS?

A demand and tender do not consist of some prescribed form of words, but they consist rather of the legal effect of what has been done. Here in the testimony quoted, the defendant stated in reply to a question by the trial judge, that they refused to accept the money they had paid on the cars, namely,

the \$16,077.50. Why should he say they refused it if he didn't understand that it had been tendered?

At the bottom of page 88 of the Transcript of the Record, which is a part of the bill of exceptions, appears an exception by the plaintiff to the action of the court in giving the instruction approved by this court. This court says:

“There is no pretence that tender was in fact made.”

We respectfully urge that defendants' own testimony shows that tender was in fact made, and we submit that the trial court was wrong in taking this question from the jury, and we respectfully urge that this court must have overlooked the testimony quoted above.

And as cumulative argument, we allude again to the fact that the defendants' answer does not rest their defense upon the claim that they were entitled under the contract to retain possession of the cars until repaid the sum of \$16,077.50, with the necessary corollary that upon the payment of that sum, the plaintiff was entitled to recover possession, but rather, they stood upon an absolute denial of any right under any circumstances in the plaintiff, and the claim of complete ownership in themselves.

In our brief, beginning at page 37, we endeavor

to point out certain errors of the trial court in its instructions relative to the question of damages, and to this phase of the case the Appellate Court has not alluded in detail.

May we respectfully ask the court to re-read and reconsider that portion of our brief found from pages 37 to 49? And we beg to remind the court that the contract between the plaintiff and defendants was lawfully and rightfully terminated some time prior to the institution of the replevin case. After this termination, the rights of the parties stood arrested and fixed as provided in the contract.

By the contract, the defendants had a lien on the property for the amount of their advances, and those advances were the subject of discussion between the defendants and plaintiff's representative, but from the time the contract was terminated the defendant had no right to sell the consigned cars unless requested to do so by the plaintiff, as it is provided in the 49th paragraph of the contract it may do, it being there provided that:

"Or at the option of the first party, it shall be the duty of the second party, and he undertakes (for the purpose of winding up the affairs of his said limited agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration."

There is no claim, or pretence, or evidence, in this case that the plaintiff ever exercised the option thus provided, and required the defendants to continue selling. On the contrary, it is beyond controversy that the plaintiff did not desire defendants to sell any more cars, and did desire to take the unsold cars back. In this condition of the contract and the relations between the parties, it was certainly error for the trial court to instruct the jury as it did (Transcript, page 106) that—

“The taking of the cars away from the defendants, of course, deprived them of the right to sell them, and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case.”

It was not the beginning of the replevin that deprived the defendants of the right to sell the cars, but the termination of the contract, and the court correctly held that that termination was within plaintiff's rights. These instructions permitted the jury to take into consideration profits which the defendants might have earned if there had been no cancellation and they had sold the cars, and that such profit had remained after the expense of con-

ducting business, but profits to which the defendants were in no way entitled after a cancellation.

These profits unquestionably were included in the \$6000 damages allowed by the jury, and figured up to the sum of \$2,477.75.

The jury were also allowed to include in their verdict, under the instructions of the court, profits which the defendants believed they would have made from the operation of the garage conducted by them in connection with their business, but the court is reminded that the evidence shows that the garage business was sold to Vick Brothers prior to the commencement of the replevin case, and subsequent to the cancellation of the contract. This sale to Vick Brothers was not a result of the replevin, but a result of the cancellation, which cancellation was admittedly within the plaintiff's rights. Defendants did not wait for a replevin suit to sell out their business to Vick Brothers, but evidently decided that if they could not represent the Ford Motor Company they had better go out of business. But if these profits in the garage business were allowed at the maximum amount testified to from the date of the replevin suit to the date of trial, the damages from this source could not exceed \$1030. The testimony quoted on pages 42, 43 and 44 of our brief is the testimony of one of the defendants, and shows the relationship between the cancellation of the contract and

the sale to Vick Brothers, and demonstrates that this item of damages ought not to have been allowed.

Hathaway, one of the defendants, testified (Transcript, page 266) that the Ford Motor Company, by its replevin suit, stopped the defendants from carrying out their deal with Vick Brothers. If this were true, it would constitute the only damages which the defendants could trace to any act of the plaintiff, and they sold out to Vick Brothers for less than \$2000.00, of which they had already received \$1000.00 in cash before the replevin suit was started.

In our original brief (page 41), we challenged counsel for defendant to show by the record any other item of damage supported by any evidence in this case, and we respectfully submit that these two items of damage were erroneously submitted to the jury by the trial court.

The testimony of both defendants appears in full in the Transcript of Record (pages 217 to 252), and there is no statement by either of them, or any one on their behalf, that they were damaged in the sum of \$25,000.00, as alleged in the pleadings, nor in the sum of \$6,000.00 as found by the jury, nor are there any damages testified to, except that relating to the profits which the defendants think they would have made if the contract had not been terminated, and the estimated profits of operating their garage. Not-

withstanding the claim in the pleadings, there was no attempt on the trial of the case to prove any other damages, and the jury went beyond the evidence in giving damages, and the court erroneously interpreted the contract in allowing the profits as an element of damages.

The bill of exceptions appears in the Transcript beginning on page 44. Attached to the bill of exceptions is a copy of the Transcript of the Testimony, beginning at page 131 of the Transcript. Beginning at page 87 appear the instructions of the court excepted to, with evidence to explain the exceptions. On page 87 appears, as a part of the bill of exceptions, what amounts to a certificate by the trial court to the effect that on the trial, counsel for the defendants contended that title to the automobiles in question passed to the defendants on the payment of the 85 per cent of the purchase price therefor, provided for in said contract. This statement by the court of the defendants' position is in line with their pleadings herein before alluded to, wherein they absolutely deny any right or title, or right of possession in the plaintiff, and assert absolute ownership and right of possession in themselves.

In spite of this condition of the Record, the trial court, as we believe, erroneously and in disregard of evidence that at the very least should have been submitted to the jury as tending to show, and as we be-

lieve showing, both a tender of the \$16,077.50 and a demand for the return of the cars, instructed the jury in effect that the plaintiff had no case to submit to them, and that the only question before them was the amount of defendants' damages, and then as we contend, erroneously, instructed the jury permitting them to include in their verdict items of anticipated profits to which the defendants could never have become entitled even though the replevin case had never been brought.

THE QUESTION OF JURISDICTION.

In taking up the question of jurisdiction, the writer of this petition for rehearing feels entitled to offer a word of explanation. As was suggested to the Appellate Court upon the oral argument by counsel on the other side, neither the writer hereof nor his firm participated in the proceedings in the court below, and were only called into this case after an appeal had been perfected for the purpose of writing the brief and arguing the case here.

It is with some diffidence that we admit that we have fallen into the same error as the District Court and the Circuit Court of Appeals, and taken the record for granted. Had the District Court done as the Supreme Court of the United States says should always first be done—inspected the record to ascer-

tain whether or not it had jurisdiction, this cause would have ended there, unless proper amendments could have been, and had been, made. In writing the brief and arguing the case in this court, we unwittingly fell into the same error of taking the jurisdiction for granted.

It has always been held, ever since the case of **Capron v. Van Noorden**, 2 Cranch 126, 2 L. Ed. 229, that the Federal Court is a court of limited jurisdiction, and that where, by the record, jurisdiction does not appear as it ought to appear, then the case ought to be dismissed. And it was there held that the plaintiff could assign as error, lack of jurisdiction in that court, to which he had himself in the first place chosen to go.

There is in the case at bar, an allegation that the plaintiff was a corporation under the laws of the State of Michigan; there is no allegation, and no showing any where in this record, as to the citizenship of the defendants.

In the case of **Börs v. Preston**, 111 U. S. 252, 28 L. Ed. 419, in which the opinion was written by Justice Harlan, the Supreme Court said:

“In cases of which the Circuit Court may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances,

declined to express any opinion upon the merits on appeal or writ of error where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption in every stage of the cause is that it is without their jurisdiction unless the contrary appears from the record."

And in the case of **Mansfield C. & L. M. R. Co. v. Swan**, 111 U. S. 379, 28 L. Ed. 462, the Supreme Court said that it would, where no motion was made by either party, on its own motion, reverse a judgment for want of jurisdiction not only in cases where it is shown negatively that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist. And the court said:

"It is true that the plaintiffs below, against whose objection the error was committed, does not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed, should be permitted to derive an advantage from it, but the rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires the court, of its own motion, to deny its own jurisdiction, and in the exercise of it appellate power, that of all other courts of the United

States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself even when not otherwise suggested and without respect to the relation of the parties to it."

The authorities bearing upon this question are collated in Taylor on "Jurisdiction and Procedure of the United States Supreme Court," pages 655, 656 and 657. Upon the authorities there cited, we respectfully suggest to this court that it is its duty to reverse the judgment of the District Court and remand the case for a dismissal. As the author of the textbook just referred to says:

"Even when the parties fail to raise the question or consent that the case may be considered on its merits, the Supreme Court must examine and determine whether a Circuit Court of the United States has or has not jurisdiction of the case it is called upon to decide."

And again—

"Where the case comes from a Federal Court on writ of error or appeal, the first and

fundamental question is that of jurisdiction—first of the Supreme Court, then of the court below.”

And again—

“The Supreme Court, on its own motion, will, for a defective averment of citizenship, reverse a judgment of a Circuit Court and remand a case.”

In *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800, the Supreme Court, after considering the errors assigned in the record, said:

“But aside from all this, we are confronted with the question of jurisdiction, which although not raised by either party in the court below, or in this court, is presented by the record, and under repeated decisions of this court must be considered.”

We, therefore, submit that a re-examination of the pleadings in this case will show that the trial court was without jurisdiction to entertain the cause or enter any judgment therein, except one of dismissal, and that the only judgment that this court can enter, in the exercise of its appellate power, is to reverse and set aside the judgment and remand to the trial court, with directions to dismiss for lack of jurisdiction.

CONCLUSIONS.

As a final word on the merits of this case, we respectfully submit that the trial court and the jury were possibly influenced and misled in their consideration of the cause by what this court in its opinion has described as the great arrogance with which plaintiff's representatives treated the defendants and their counsel at their interview in the City of Eugene. We are ready to concede that that representative fell short of any standard of diplomacy, but yet we contend that the rights of the plaintiff should not be sacrificed by conduct or language of which it unquestionably would be the last to approve, but rather should be measured —(a) by the contract, which the trial court has said was the basis of the parties' rights, and which nevertheless we contend he misunderstood and misinterpreted, and—(b) by the evidence in the cause, and the pleadings, and the position taken by the defendants thereon.

We respectfully submit that this court in its opinion has overlooked the fact that the defendants at all times contended and insisted, even to the argument in this court, that the cars in question were their absolute property and that no demand or tender or any act on the part of the plaintiff could give the plaintiff any right to the possession thereof. With the defendants taking such a position, we sub-

mit that it is neither law nor common sense to require that proof of demand, which might be proper if the defendants had come in and said—"Yes, this is your property, but you haven't heretofore asked for its return."

We submit that the evidence, which we have heretofore in this petition for rehearing quoted, indicates that the defendants clearly understood that they were being offered \$16,077.50, and that that offer accompanied a request for the return of the cars. We further submit, that the court disregarded the contract between the parties in instructing the jury that they might award to the defendants profits on the sale of cars after the termination of the contract. We further submit that on the evidence in this case, even if the instruction just alluded to had not been erroneous, the defendants say all that could be said for their judgment, where on page 18 of their brief in this court they assert that appellant concedes (as it does not, and did not) "that the verdict for damages is fully sustained, except as to \$3,507.75, and, therefore, we say the judgment should be affirmed, and the only question involved is whether we remit \$3,507.75 or not." We do not find any offer on the part of the defendants beyond this, or any direction by the court that the judgment should require a remittitur in the amount named. There was some evidence offered, although we contend wrongfully, as to the items mentioned on the

page of respondents' brief referred to, but no evidence of any other or further damage.

We respectfully urge upon this court that the defendants on the trial of this case took a position and asserted claims in defiance of our rights under our contract with them—a contract which this court in the case of Ford Motor Company vs. Boone, et al., has held to be a valid and lawful contract. The record in this case discloses that on the trial, conflicting and contradictory positions were advanced with regard to this contract, and the plaintiff did not receive from the trial court a proper interpretation of said contract, and its rights have not been protected, and an erroneous judgment has been entered.

Respectfully submitted,

PLATT & PLATT,

Attorneys for Plaintiff and Appellant.

Harrison G. Platt,
L. B. Robertson,
Of Counsel.

United States Circuit Court of Appeal

FOR THE NINTH CIRCUIT.

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,
vs.

E. A. FARRINGTON, and L. A. HOUCK, co-partners, doing business under the name and style of the PACIFIC TRANSFER COMPANY, J. DANIELS, H. SANDGATHE, doing business as SPRINGFIELD GARAGE, V. W. WINCHELL and F. M. HATHAWAY, co-partners, doing business under the name and style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, co-partners, doing business under the firm name and style of A. WILHELM & SON,

Defendants and Appellees,

ANSWER TO PETITION FOR REHEARING.

LOGAN & SMITH,
Portland, Oregon.

CHARLES A. HARDY, F. O. BROWN,
Eugene, Oregon,
Attorneys for Appellees.

FILED
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F. O. BROWN

United States Circuit Court of Appeal

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Defendants and Appellees,

ANSWER TO PETITION FOR REHEARING.

In the petition for rehearing the plaintiff in error makes a new contention assailing the jurisdiction of this court; and urges for the first time that neither the lower court nor this

court has any jurisdiction of the controversy because the record does not show diverse citizenship.

POINT I.

The record affirmatively shows (tr. 5, Par. 1), that plaintiff is a foreign corporation organized and existing under and by virtue of the laws of the State of Michigan, etc., but fails to show the citizenship or residence of the defendants.

The trial was had, verdict rendered in favor of the defendant Eugene Ford Auto Company, and thereafter writ of error was prosecuted to this court whereupon the proceedings below were sustained, and now on rehearing the appellee urges reversal because of the absence of a showing of diverse citizenship. If this point is sustained, we believe the proper procedure and practice is that set forth in

Fitchburg R. Co. v. Nichols (1 C. C. A.) 85 Fed. 869,
as follows: (page 870).

“Before Colt and Putnam, Circuit Judges, and Webb, District Judge.

Putnam, Circuit Judge. The record in this case contains the suitable allegations to show the citizenship of the corporation defendant in the court below, but it fails in this respect as to the plaintiff below. There are only

two courses open. If the plaintiff below is an alien, or a citizen of some state other than Massachusetts, the record may be amended in this court according to the truth by the consent of both parties. *Fletcher v. Peck*, 6 Cranch, 87, 127; *Kennedy v. Bank*, 8 How. 586, 611; *U. S. v. Hopewell*, 51 Fed. 798, 800, 2 C. C. A. 510; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 61 Fed. 237, 245. If this is not done, the judgment of the court below must be reversed. It is not necessary to set aside the verdict, as the court below may allow an amendment, in accordance with the facts, to supply the defect, as well after verdict as before, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. All this is not only in accordance with the general principles of law, but is emphasized by section 954 of the Revised Statutes, and paragraphs 1 and 3 of rule 11 of the circuit court. Of course, if an amendment is not made, or the issue made by it is not sustained, it will be the duty of the court below to dismiss the suit. It is ordered that the judgment of the circuit court be reversed, without costs for either party in this court, and that the case be remanded to the circuit court for further proceedings according to law, unless an amendment is made in this court on or before February 1, 1898, as provided in this opinion."

Watson v. Bonfils 116 Fed. 157 (8 C. C. A.) (161:

"An appellate court has no power to allow such an amendment, but in cases in which there has been no issue regarding citizenship in the court below, and through the mistake or inadvertence of one of the parties the requisite averments have not been made, it may reverse and remand the case, with leave to the court below to permit their insertion, in the proper pleading by an amendment. *Insurance Co. v. Rhoads*, 119 U. S. 237, 240, 7 Sup. Ct. 193, 30 L. Ed. 380; *Morgan v. Gay*, 19 Wall, 81, 22 L. Ed. 100; *Robertson v. Cease*, 97 U. S. 646, 651, 24 L. Ed. 1057; *Railway Co. v. Newcomb*, 6 C. C. A. 172, 173, 56 Fed. 951, 952; *Railroad Co. v. Nichols*, 29 C. C. A. 464, 85 Fed. 869."

Grand Trunk Western Ry. Co. v. Reddick, 160 Fed. 898 (7 C. C. A.) (901):

"The trial was free from error throughout. But the judgment must be reversed on account of plaintiff's omission respecting citizenship. A question remains. How far ought the proceedings to be opened up? Defendant confessed the cause of action. The damages were properly proved and assessed. The justice of the matter is that plaintiff should not be required to go through another trial unless that course is unavoidable. Jurisdiction and merits are separate questions, and may properly be determined separately. Want of jurisdiction, by the very nature of the question, is merely a matter of abatement. If plaintiff has averred that he was a citizen of Illinois

and defendant a corporation organized and existing under the laws of Michigan, and if defendant could honestly have challenged those allegations or either of them, the issue could have been determined in advance of a trial on the merits. We see no just reason why, after a trial on the merits, the logically separable matter of jurisdiction should not be determined. *Fitchburg R. Co. v. Nichols*, 85 Fed. 869, 21 C. C. A. 464; *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914. If, after plaintiff amends, the jurisdictional averments should be denied, the issue may be tried according to the practice with respect to pleas in abatement. The judgment is reversed, with the direction to proceed in conformity with this opinion."

This practice is sustained in:

M'Eldoney v. Card, 193 Fed. 475 (*syllabus points 9, 10 and 11, pages 483 and 484*).

Because the merits of the controversy have been decided in favor of the appellees, the procedure applicable to this case is, we respectfully submit, that outlined in the authorities above, and is clearly distinguishable from such cases as:

Post v. Beacon Vacuum Pump Electrical Co. (1 C. C. A.) 89 Fed. 1 (*pages 5 and 6*).

Submitted herewith are affidavits showing the citizenship of each defendant which is diverse from that of plaintiff.

COSTS.

We believe that the costs of this writ of error should be taxed against the Ford Motor Co. It was the plaintiff below, and if it failed to allege jurisdictional averments when the facts warranting such allegation existed, it should not be permitted to go unwhipped of justice for its tactics.

The Federal Supreme Court has awarded costs against the plaintiff which fails to allege diverse citizenship and seeks to take advantage of its own failure, and thereby to escape a just judgment rendered against it.

In

Halsted v. Buster, 119 U. S., 341 (Bk. 30 L. 462)

and

Menard v. Goggan, 121 U. S. 253 (Bk. 30 L. 914)

the rule is thus expressed:

“(Syllabus, Point 2; 30 L. 914). Upon a reversal of a decree for want of jurisdiction in the court below, costs are allowed against the complainant, he having failed to put on record the facts necessary to show jurisdiction.

Reference is made to the affidavits of each defendant sub-

mitted herewith to show that jurisdiction because of diverse citizenship did in fact exist at the time of the commencement of this case so that your Honors may make proper disposition of questions, to-wit:

(a) Costs on this writ of error;

(b) Directing the lower court to permit amendments, should the defendants desire to make such, so as to frame a direct issue on the diverse citizenship of the parties.

(c) Permitting the verdict to stand until trial of that question and entering judgment accordingly.

We therefore respectfully ask that if this case is reversed that the verdict should be permitted to stand and the appellees shall be allowed to amend the pleadings so as to frame a direct issue upon diverse citizenship and that appellees be required to make proper service of their amended pleading, and the lower court directed to try such issue, and upon its determination, if it be sustained, then that judgment be re-entered upon the verdict already in the record.

POINT 2.

MERITS OF THE CASE.

At pages 4 to 17 of the petition for re-hearing the question of the necessity for a demand and tender is again presented.

At pages 9 and 10 certain quotations are made from the transcript at page 257 et seq. This excerpt from the testimony of defendant and Witness Hathaway is incorrectly segregated from the other testimony to which it relates, and standing alone it gives an erroneous impression as to what the testimony was. At pages 254 to 264 the testimony of this witness discloses that the portion of the testimony quoted in the petition for rehearing is only a part of a proposed and contemplated compromise and settlement of all claims. That compromise involved the following items:

(a) The return of the \$16,077.50 which the Eugene Ford Motor Company had paid for the cars.

(b) The taking over of this stock including parts and garage extras, tools, accessories, typewriter desk and fixtures at the full retail price which Winchell and Hathaway had paid therefor.

(c) The payment of the bonus money, etc.

(d) The return of the contract money.

(e) The return of the deposit money.

To clarify this situation we quote from pages 254 to 257:

"Q. Now, did you and Mr. Goden come to any understanding as to how you would sell them?

A. We told Mr. Goden that we didn't consider our contract cancelled yet, and that we had a nice business there and we didn't care to go out of it. Well, he maintained that we could see that our contract was cancelled and we just as well begin negotiating some kind of a deal for straightening it out. So he mentioned, he says, 'I have always dealt fairly with you boys. I wish you would take my advice.' He says, 'I will tell you what I advise you to do because,' he says, 'you can't afford to resist this because the Ford Motor Company—the large capital they have behind them, they will carry this thing along in the various courts, and you will get off at the little end of the horn in the long run anyway.' So we didn't know what to say or do, but he told me of a deal that he had put through up at LaGrande where the man—he told me how to get out of it easy, and that he didn't follow his advice with regard to it, and he afterwards admitted that he should have followed his advice with regard to it. So we told him that we would think it over, and we would let him know later what we thought about it.

Q. Well, did you and he finally come to any terms?

A. Well, the next morning—that evening: Mr. Winchell and I talked it over and we was—well, we was undecided as to what to do. We didn't know where we were at. We felt that the Ford Motor Company would have the upper hand of us, and that we better do some-

thing, and we decided that night to accept their offer, provided they paid us back our full amount that we had invested in the cars, and that Vick Brothers took over our stock including parts and garage extras that we had for repairs, tools, and our accessories, typewriter, including a desk and various fixtures that we had, at the full retail price, that is, what we paid for them.

Q. What about the bonus money and contract money?

A. The bonus money was to be forthcoming from the Ford Motor Company: it was understood that was to be paid to us on the volume of business that we had done up to that time.

Q. Including these cars in question?

A. Including the cars in question.

Q. What about the amount you had deposited with them? Did he agree to give you that?

A. Yes, sir, we had \$800.00 deposited.

Q. Did they keep that arrangement? Did they carry that out?

A. No, sir.

Q. Did Mr. Goden leave?

A. Well, we told Mr. Goden that upon the payment of that in cash that we would accept it, and that we couldn't consider anything else but a cash proposition; so he says that he could get the cash, and he says, 'You leave it to me; I will go to Portland, and I will fix this up.' So he left for Portland.

Q. And when he came back, what occurred? Tell the jury.

A. When he came back, I don't remember just how we met Mr. Goden, whether we talked to him over the phone or met him personally. Anyway we agreed to meet him at the Osborne Hotel Friday night.

Q. Who went to the hotel?

A. Well, Mr. Winchell and I, our attorney, Mr. Hardy, went to the hotel that evening, and met Mr. Goden and Mr. Vick in the lobby and we introduced each other all the way around, and Mr. Goden suggested that we go up to his room, so we did so, and Mr. Winchell asked Mr. Goden if he was ready to pay over the cash—the money. Well, Mr. Goden said that he couldn't do that; that after interviewing the managers at Portland, why they had objected, but they had agreed to pay over the 85 per cent list price of the cars in question on the cars that we had in stock at that time.

Q. What about the contract money and the bonus money? Your own money that was deposited and your bonus money?

A. Well, he said that could be taken care of afterwards. He says 'I can't say; you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.'

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind; that kind; that we were entitled to our bonus money and also to our deposit, and he said, well he says, 'I am only authorized to pay you the 85 per cent,' and he says 'I have the authority, or have the money at the First National Bank, and can make you a check tomorrow morning.'

Q. Do you recall then what I said?

A. Well, Mr. Hardy mentioned that we could take this under advisement, and immediately Mr. Goden mentioned that the deal was all off; well, Mr. Hardy says, 'Then it is time for us to go. We will just simply take this under advisement.' And we got out, half way to the door and Mr. Goden repeated that.

Q. Repeated what?

A. That the deal was all off; when we got out to the elevator and aw sstepping it, and he followed out there, and Mr. Vick and Md. Goden said that the deal was all off."

With the record in this condition we respectfully submit that the construction attempted to be placed upon this testimony in the petition for rehearing is incorrect and unjust.

We insist, again, that no demand as required by law, nor tender as provided in the contract, was ever made and here we repeat our former contention, in this particular case both demand and tender were conditions precedent to the existence of a right to maintain this case by plaintiff in error.

See:

Freeman v. Trummer, 50 *Orc.* 287 (292, 293);

Latham v. Davis, 44 *Fed.* 863;

People's Furniture Co. v. Crosby, 57 *Neb.* 282; 73 *Am. St.* 504.

POINT 3.

Appellees do not concede that jurisdiction in this case depends SOLELY upon diverse citizenship.

The plaintiff brought this case to enforce its alleged rights under a contract and must of necessity, rely upon such contract.

The complaint specifically refers thereto (Allegation VI, p. 6) and the contract itself was introduced in evidence as part of plaintiff's case in chief. (Tr. pp. 132-161).

The defense claimed rights which were violated by the attempted enforcement of this contract which was assailed as void and for conflict with the Anti-Trust Laws of the United States.

It is true that the court tried the case without deciding this question (Tr. p. 307); and, that this court in its opinion says:

"But in view of the fact that the cause was tried and submitted on the theory that the contract was valid and that the rights of the parties were defined and were to be measured thereby, the inquiry is thought to be immaterial."

The defendants asserted a right because of a violation of the Anti-Trust Acts of the United States by the identical contract upon which plaintiff sought recovery, and in the brief of plaintiff in error ~~he~~ find this language:

"(Pp. 24-25) It is apparent from the record that this contention of defendants is based upon the claim that the contract between the plaintiff and the defendants, as its agents, was not what its language expressed, but that instead of a consignment to an agent, the actual transaction was a sale by the plaintiff to the defendants, with an attempt to control the prices and conditions of subsequent

sales by the agents to the public in violation of the Act of Congress of July 2nd, 1890, known as the Sherman Anti-Trust Act.

“It becomes necessary therefore to take this contract by its four corners and ascertain from the terms and provisions thereof whether the contract is what it purports to be—etc.”

Appellants' brief (pp. 62-155) is devoted to a lengthy discussion of the point, although there was no exception to the court's attitude.

It seems plain then, that so far as the parties to the case are concerned the following status is shown by the record:

1. At the trial the defendants urged rights arising from claimed violation of the Anti-Trust Acts, and distinctly sought relief therefor, as shown in Tr. pp. 300-308;

2. On this writ of error, the appellant concedes that the question was necessarily involved.

The question was not and is not wholly frivolous; and while it is true the lower court tried the case without regard to the determination of the asserted right, yet the failure of a federal court to sustain such asserted federal right, does *not* deprive the court of the jurisdiction to try the case.

In

Winchester v. Heiskell, 119 U. S. 450 (Bk. 30 L. 462), it is said at 30 L. p. 464:

“An immunity was claimed by the appellants under this statute from the operation of the decree of the state court on their rights, because that statute made the jurisdiction of the courts of the United States exclusive in such cases.

We have jurisdiction, but as the decision of the state court upon this question was clearly right, we do not care to hear further argument.”

Likewise, here, Judge Bean did NOT SUSTAIN the claimed right; but the right was claimed, and it was not frivolous; the appellant concedes it to be “NECESSARY.”

Under the Clayton Act this asserted RIGHT confers jurisdiction on the federal court, regardless of diverse citizenship or amount. See,

Clayton Act, U. S. Comp. St. 1916, Vol. 8, Sec. 8835-(d)-8835-(k).

This controversy therefore, was “A CASE” of which Federal Courts have cognizance.

Osborne v. United States Bank, 9 Wheaton 819; (Bk. 6 L. 204).

And the court having acquired jurisdiction to hear this question, held it for the entire controversy;

Orleans v. Steamship Co., 20 Wall. 392; 22 L. 354.

The existence of this asserted right under the Clayton Act, therefore, gave jurisdiction irrespective of citizenship or amount involved. But the appellant is not in position to urge the question here, as it took no exception to the ruling of Judge Bean. (Tr. pp. 301-307).

That the existence of a Federal question because of asserted conflict between state laws and the United States Constitution gives jurisdiction of the entire controversy is held in,

Horner v. U. S. 143 U. S. 576; 36 L. 266;

Chapelle v. U. S., 160 U. S. 509; 40 L. 510;

Scott v. Donald, 165 U. S. 71; 41 L. 632.

Judge Bean was compelled to consider the contract and our asserted rights, to decide whether such rights arose under a contract which was violative of the Clayton Act. This is what conveys jurisdiction over the controversy.

Stewart Mining Co. v. Ontario Mining Co., 35 S. C. 610; 237 U. S. 350, *Aff'd Idaho Supreme Court.*

Jones Nat. Bank v. Yates, 36 S. C. 429; 240 U. S. 541;

Carlson v. Washington Ex Rel Curtis, 34 L. 717; 234 U. S. 103;

Holder v. Aultman Miller Co., 169 U. S. 81; Bk 42 L. 669, *Syllabus, point 1.*

We therefore submit that the jurisdiction in this case did not and does not depend SOLELY upon the question of diverse citizenship, and the judgment should be affirmed.

In conclusion we submit :

(a) That if the case is reversed for failure of the record to show diverse citizenship, the verdict should be permitted to stand the defendants be given the right to amend their pleadings relative thereto; that the lower court be instructed to try that issue and proceed in accordance with the authorities cited under Point 1.

(b) That the Federal question urged was not entirely frivolous and that it gave jurisdiction of the whole controversy.

(c) That the decision heretofore rendered on the question of tender and demand should stand, and the verdict be sustained.

Respectfully submitted,

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA
J. HAYS, His Wife, T. F. MENTZER and
ELIZABETH E. MENTZER, His Wife,
A. D. CAMPBELL and JESSIE E. CAMP-
BELL, His Wife, DAVID COPPING and
EVA COPPING, His Wife,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Southern Division.

Filed

JUL 3 - 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA
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BELL, His Wife, DAVID COPPING and
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

C. B. WHITE, Esquire, L. C. Smith Building,
Seattle, Washington;

JOHN D. FLETCHER, Esquire, Fidelity Building,
Tacoma, Washington;

ROBERT E. EVANS, Esquire, Fidelity Building,
Tacoma, Washington;

Attorneys for Plaintiff in Error.

PRESTON M. TROY, Esquire, Olympia, Washing-
ton;

ROBERT F. STURDEVANT, Esquire, Olympia,
Washington;

CHARLES O. BATES, Esquire, National Realty
Building, Tacoma, Washington;

CHARLES T. PETERSON, Esquire, National
Realty Building, Tacoma, Washington;

Attorneys for Defendants in Error. [1*]

*In the United States District Court for the Western
District of Washington, Southern Division.*

No. 1783.

NATIONAL SURETY COMPANY,

Plaintiff,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA
HAYS, His Wife; T. F. MENTZER and
ELIZABETH E. MENTZER, His Wife; A.
D. CAMPBELL and JESSIE E. CAMP-
BELL, His Wife; and DAVID COPPING
and EVA COPPING, His Wife,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-named Court:

You will please prepare and certify to constitute the record on appeal in the above-entitled case type-written copies of the following papers, omitting all captions, excepting on the Amended Complaint, omitting also all verifications, acceptances of service, file-marks and other endorsements, said transcript of record to be forwarded to and filed in the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to be printed there according to the rules of said Circuit Court of Appeals:

1. This praecipe.
2. Amended Complaint.
3. Answer of A. D. Campbell and wife.
4. Second Amended Answer of T. F. Mentzer and Others to Amended Complaint.
5. Reply to Answer of A. D. Campbell and Wife.
6. Reply to Second Amended Answer of T. F. Mentzer and Others.
7. Judgment.
8. All orders Extending Time.
9. Bill of Exceptions and Statement of Facts.
10. Petition for Writ of Error.
11. Assignment of Errors.
12. Order Allowing Writ of Error.
13. Bond on Writ of Error. [2]
14. Stipulation Regarding Transcript.
15. Stipulation as to Original Exhibits.

16. Order Directing Original Exhibits to be Forwarded to Circuit Court of Appeals.

C. B. WHITE,

FLETCHER & EVANS,

Attorneys for Plaintiff.

(Filed March 29, 1917.) [3]

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

No. 1783.

NATIONAL SURETY COMPANY,

Plaintiff,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA
HAYS, His Wife; T. F. MENTZER and
ELIZABETH E. MENTZER, His Wife; A.
D. CAMPBELL and JESSIE E. CAMP-
BELL, His Wife; and DAVID COPPING
and EVA COPPING, His Wife,

Defendants.

Amended Complaint.

Comes now the *above plaintiff above* and for cause of action against the defendants and each of them in this its amended complaint complains and alleges:

I.

That the plaintiff is a corporation duly organized and incorporated and existing under and by virtue of the laws of the State of New York and its principal place of business is in New York City in the said State of New York, and that said plaintiff is a

citizen and resident of the State of New York and is duly qualified and licensed to transact a general surety business within the State of Washington and has fully complied with the laws of the State of Washington in that regard.

II.

That Isaac Blumauer, T. F. Mentzer and Elizabeth E. Mentzer, his wife; W. Dean Hays and Ora Hays, his wife; A. D. Campbell and Jessie E. Campbell, his wife, and David Copping and Eva Copping, his wife, were and each of them now is a citizen of the State of Washington, and a resident in the Southern Division of Washington. [4]

III.

That on or prior to the 22d day of June, 1914, and on and prior to the 22d day of June, 1911, the State Bank of Tenino was a corporation organized and existing under and by virtue of the laws of the State of Washington and duly authorized to engage in and did duly engage in and was at the time above-mentioned actually engaged in the banking business in the city of Tenino, Thurston County, Washington.

IV.

That on and immediately prior to the 22d day of June, 1911, and from that on continuously and after June 22d, 1914, said defendants Isaac Blumauer, T. F. Mentzer, A. D. Campbell and W. Dean Hays, each acting for and on behalf of himself and the community composed of himself and wife, desired to secure the deposit in the State Bank of Tenino of a certain sum of money belonging to Thurston County, Washington, in the possession of the County Treas-

urer of said Thurston County, Washington.

V.

That in order to secure the deposit in said State Bank of Tenino of said funds, by the county treasurer of Thurston County, it became necessary for said State Bank of Tenino to furnish a bond as provided by law conditioned for payment to said county treasurer of any sum deposited by him in the State Bank of Tenino upon demand being made therefor.

VI.

That on or about the 19th day of June, 1911, the officers and directors of said State Bank of Tenino applied to the National Surety Company, plaintiff herein, for a bond in the sum of Five Thousand (\$5,000) Dollars to secure the repayment to said county treasurer of Thurston County, Washington, for any sum deposited by him in the said State Bank of Tenino and that on or about the 22d [5] day of June, 1911, the said State Bank of Tenino, as principal, and the National Surety Company, as surety, executed and delivered a bond conditioned according to law, a true and correct copy of which bond is hereto attached and marked Exhibit "A" to the same effect as if specifically set forth in this paragraph.

VII.

That as a part of the transaction heretofore set forth in paragraph VI hereof and in order to induce the plaintiff herein to execute said bond mentioned, the defendants Isaac Blumauer, W. Dean Hays, A. D. Campbell, T. F. Mentzer and David Copping, each acting for himself and the community

composed of himself and wife, agreed to execute and thereupon voluntarily of his own free will and accord did make, execute and deliver to the plaintiff herein a certain agreement and contract of indemnity to indemnify and keep indemnified and hold harmless the said plaintiff, the National Surety Company, from all demand, liability, loss, damages of whatsoever kind or nature, etc., which said plaintiff should incur by reason of having executed and given the bond heretofore referred to in paragraph VI hereof, or the alteration, change, modification, amendment, limitation, extension or renewal thereof, or the substitution of other or new obligations in its place or in lieu thereof, a copy of which said agreement and indemnity contract is hereto attached and marked Exhibit "B" to the same effect as if specifically set forth in this paragraph.

VIII.

That on or about the 22d day of June, 1914, the State Bank of Tenino, acting by and through the defendants, Isaac Blumauer and W. Dean Hays, its president and cashier, respectively, requested the plaintiff herein that said bond, Exhibit "A," be renewed, and said plaintiff acting on said application and relying solely and wholly upon the defendants' agreement and contract of indemnity, [6] Exhibit "B," did execute the bond for Five Thousand (\$5,000) Dollars to secure the repayment of said county treasurer of Thurston County, Washington, of any sum deposited by him in the said State Bank of Tenino, all according to the law in the premises, said county treasurer having had county funds de-

posited in said State Bank of Tenino continuously from June 22d, 1911, until September 19, 1914, a copy of which bond is hereto attached and marked Exhibit "C" to the same effect as if specifically set forth in this paragraph.

IX.

That on or about September 19th, 1914, while the obligations heretofore referred to in paragraphs VII and VIII hereof remained in full force and effect, the said State Bank of Tenino closed its doors and ceased longer to transact the banking business in the State of Washington and thereafter on or about October 5th, 1914, Ray A. Langley was duly appointed receiver for said State Bank of Tenino and at all times since that date has been and now is the duly qualified and acting receiver for said bank.

X.

That the Chicago Bonding & Surety Company furnished a bond to the said State Bank of Tenino conditioned for the repayment to the said county treasurer of Thurston County, Washington, all the funds deposited in said State Bank of Tenino.

XI.

That on September 19th, 1914, the county treasurer of Thurston County, Washington, had on deposit in the said State Bank of Tenino the sum of Twelve Thousand Eight Hundred Twenty-three and 58/100 (\$12,823.58) Dollars.

XII.

That after the appointment of the receiver for said State [7] Bank of Tenino, demand was duly and regularly made upon the said State Bank of

Tenino and upon the plaintiff as surety on said depository bond for the payment to the said county of one-third of the sum on deposit by the county treasurer of Thurston County, Washington, in the said State Bank of Tenino on September 19th, 1914, together with interest on the average daily balance, Thirteen Thousand Two Hundred Two and 96/100 (\$13,202.96) Dollars at the rate of two per cent per annum from August 31st, 1914, up to and including September 22d, 1914.

XIII.

That after notice and demand upon the plaintiff herein for the payment of said sum the plaintiff made demand upon the defendants that they comply with the treasurer's demand, the said plaintiff's demand being made by letter to each of said defendants.

XIV.

That the defendants and each of them failed and neglected to comply with the treasurer's demand or said plaintiff's demand and thereafter on December 30th, 1914, the plaintiff herein was compelled to pay and did pay to the county treasurer of Thurston County, Washington, the sum of Four Thousand Three Hundred Twenty-eight and 77/100 (\$4,328.77) Dollars, which was the plaintiff's one-third under said bond, Exhibit "C," together with interest thereon at the rate of 2% per annum from August 31st, 1914, to September 21st, 1914, and then at the rate of 6% per annum from September 21st, 1914, until date of payment.

XV.

That in addition to the payment to said county treasurer of Thurston County, Washington, of the sum heretofore mentioned, in paragraph XIV hereof, the plaintiff has sustained and incurred costs and expenses in consequence of its having executed said bond [8] and costs and expenses incurred in investigating claim against said bond in the sum of Fourteen (\$14) Dollars.

XVI.

That no part of said sum mentioned herein or any part thereof having been paid by the defendants herein or any of them, although demand has been made therefor.

WHEREFORE, the plaintiff, the National Surety Company, prays for judgment and decree of the Honorable Court against the defendants Isaac Blumauer, A. D. Campbell and Jessie E. Campbell, his wife; W. Dean Hays and Ora Hays, his wife; T. F. Mentzer and Elizabeth E. Mentzer, his wife, and David Copping and Eva Copping, his wife, in the sum of Four Thousand Three Hundred Twenty-eight and 77/100 (\$4,328.77) Dollars, together with interest thereon at the rate of 6% per annum from December 30th, 1914; together with judgment and decree for the further sum of Fourteen (\$14) Dollars, and also for all costs, expenses and attorney's fees herein and for such other and further relief as the Honorable Court shall deem just and equitable in the premises.

C. B. WHITE,
Attorney for Plaintiff.

Exhibit "A" to Amended Complaint—Depository Bond, June 22, 1911, Between State Bank of Tenino and National Surety Company.

KNOW ALL MEN BY THESE PRESENTS, That we, THE STATE BANK OF TENINO, of Tenino, Washington, as principal, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto Robert Marr, individually and as County Treasurer of the County of Thurston, State of Washington, in the full and just sum of Five Thousand (\$5,000) Dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and surety *representatively* bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

SIGNED, SEALED AND DELIVERED at Seattle, Washington, this 22nd day of June, A. D. 1911.

THE CONDITION OF THIS OBLIGATION IS SUCH, that, whereas the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such treasurer, at the [9] special instance and request of the said State Bank of Tenino, has deposited, or may hereafter, from time to time, deposit, and place in charge of the said principal hereinbefore named, certain moneys, checks, etc., for the custody or for the proceeds of the face value of which the said treasurer as such, may be responsible, and

NOW, THEREFORE, if the said principal here-

inbefore named shall in due and ordinary course of business, promptly pay to the said treasurer upon demand and presentation of proper and valid checks therefor, in the usual and ordinary hours of business, all moneys and proceeds of all checks, etc., which have been or shall hereafter be deposited with, transferred to or placed in charge of the said principal, by or on behalf of the said treasurer, and shall keep and hold harmless the above named Robert Marr, individually, and as such treasurer, from all liability, loss and damage which may arise, or accrue against the said treasurer by reason of the deposit or delivery of said funds, checks, etc. or any part thereof as aforesaid, and shall well and truly fulfill and perform any and every duty and obligation arising out of or connected with the deposit, or delivery of funds as aforesaid, by and on behalf of said treasurer, then this obligation to be void; otherwise to be and remain in full force and effect.

PROVIDED, HOWEVER, upon the further following express conditions:

FIRST: That in the event of any default on the part of the principal, written notice thereof with a verified statement of the facts showing such default, and the date thereof, shall within ten (10) days after the knowledge of such default, has been received by the said Robert Marr, or his representatives, be mailed to the surety at its office in New York City.

SECOND: That the surety shall not be liable for any deposits made after any such default shall have come to the knowledge of the said Robert Marr or his representatives:

THIRD: That the said surety shall not be liable hereunder except for the loss of moneys belonging to the said Robert Marr, treasurer, and which shall have been deposited with the aforesaid principal by the said Robert Marr, as treasurer aforesaid, or to his credit as such treasurer.

FOURTH: That no such suit, action or proceeding shall be brought or instituted against the surety upon, or by reason of any default, of the principal after the expiration of sixty (60) days after such default, or, in any event, after the 22nd day of June, 1912.

FIFTH: That the surety shall have the right to terminate its suretyship under this obligation by serving notice of its election so to do upon said "obligee" or his or its lawful representatives, and thereupon the said surety shall be discharged from any and all liability hereunder for any default of the principal after the expiration of thirty days after the service of such notice.

SIXTH: That, if the obligee shall at any time hold concurrently with this bond, or represent to the surety, in any statement to it, that it does or will at any time hold concurrently with this bond, or any other bond or collateral as guarantee of security from or on behalf of the principal, the obligee shall be entitled, in event of loss as hereinbefore stated, to claim hereunder only such proportion of the loss as the penalty of this bond bears to the sum of the penalties [10] of all bonds and amount of collateral carried, or to be carried on the principal's behalf, and in no event shall the surety be liable for

any sum in excess of the penalty of this bond.

STATE BANK OF TENINO,

By _____,
President.

Attest: By _____,
Cashier.

Exhibit "B" to Amended Complaint — Indemnity Agreement, June 22, 1911, Between Isaac Blumauer et al. and National Surety Company.

F. 10 5-09-5m

Indemnity Contract for Bond
No. _____

NATIONAL SURETY COMPANY.

THIS AGREEMENT WITNESSETH, That
Whereas, we the undersigned have requested the
NATIONAL SURETY COMPANY, a corporation
under the laws of the State of New York, (herein-
after called the Company), to sign and execute a
certain bond or undertaking in the penalty of Five
Thousand Dollars (\$5,000.00) in behalf of the State
Bank of Tenino in favor of the Treasurer of Thurs-
ton County, Washington, effective June 22, 1911,
covering deposits of the said Treasurer, in said bank.

.....
.....
.....

reference to which bond or undertaking made for the
purpose of certainty and a copy of which instrument
is or may be hereto attached; and

WHEREAS, The company has signed and exe-
cuted, or is about to sign and execute the said instru-

ment upon condition of the execution thereof and upon the security and indemnity hereby and herein provided.

NOW, THEREFORE, In consideration of the premises of the sum of One Dollar in hand paid to us by the Company, the receipt whereof is hereby acknowledged, we, the undersigned, hereby covenant and agree with the Company, its successors and assigns, in manner following:

FIRST: That we *will in* cash to the Company as its principal in the City of New York, or to such agent or representative of the Company as the Company may in writing designate, the sum of Twenty-five and no/100 (\$25.00) Dollars, which is agreed by the undersigned to be the Company's compensation for the accommodation afforded the undersigned by the execution of said instrument by the Company, said sum to be paid to the Company annually in advance on the Twenty-second day of June.....

.....
.....
in each and every year during the time the Company shall be and continue liable upon said instrument and, until the Company shall have been fully discharged and released from any and all liability upon the said instrument, and all matters arising therefrom, and until there shall have [11] been furnished to the Company, at its principal offices in the City of New York, due and satisfactory proof by evidence legally competent, of such discharge and release.

SECOND: That we will at all times indemnify the Company, and hold and save it harmless from and against any and all demands, liabilities, loss, damage

or expense *or* whatsoever kind or nature, including counsel and attorney's fees, which it shall at any time sustain or incur by reason, or in consequence of having executed the said *instrumental* and that whenever any claim or claims shall have been made upon the Company under the said instrument, if in the judgment of the Company it is determined that such claim or claims should be paid, we covenant, promise and agree to pay over in cash to the Company upon its demand therefor, the amount or amounts of such claim or claims, and if the Company deny liability concerning any claim or claims and suit or suits be brought against the Company, under said instrument to recover the amount of said claim or claims, or any other proceedings be taken thereon involving the Company, whether the suits and proceedings be against the principal named in the said instrument, and the Company jointly, or against the Company alone, we covenant and agree to defend said suits and proceedings to a conclusion at our own expense, or to permit the Company, if it so elect, to place the defense of such suits and proceedings in the hands of its own attorneys or counsel, in which latter event we covenant, promise and agree to pay over to the Company upon its demand such sum or sums of money as may be required to retain said attorneys or counsel and to defray the expenses of conducting the defense of said suits and proceedings; and further we covenant and agree to satisfy and discharge any and all judgments recovered against the Company under said instrument as soon as the same shall be entered or docketed unless an appeal be taken and bond or bonds to secure or stay the collection of such

judgment or judgments be procured by the undersigned and filed as required by law, and if final judgment be recovered or entered against the Company after the decision of such appeal, we covenant and agree to forthwith satisfy and discharge every such final judgment without requiring the Company to take any steps whatsoever thereon; and should judgment be entered against the principal in said bond and the Company, or against the Company alone, in either event, should the undersigned not procure an appeal to be taken and furnish bond or bonds to secure, supersede or stay the collection of such judgment, the Company may, if it elect, pay said judgment, whereupon we agree forthwith to repay the Company, the amount of said judgment so paid, together with legal interest thereon from the date of payment to the date of such re-payment; that we will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money not hereinbefore provided for, which the Company or its representatives shall pay, or cause to be paid, or become liable to pay under its obligations upon said instrument, or as charges and expenses *or* whatsoever kind or nature, including counsel and attorney's fees by reason of the execution thereof, or in connection with any litigation, investigation or other matters connected therewith such payment to be made to the Company as soon as it shall have become liable therefor, whether it shall have paid out said amount or any part thereof, or not.

That in any settlement between us and the Company, the vouchers or other proper evidence showing payment by the Company of any such liability, loss,

damage, or expense, shall be prima facie evidence against us of the fact and amount of our liability to the Company, provided that such payment shall have been made by the Company in good faith, believing that it was liable therefor. [12]

THIRD: That in case of any action at law, suit in equity, or other proceeding be commenced or notice of such action, suit or proceeding be served upon the undersigned, affecting the liability of the Company upon said instrument, or growing out of any matter connected herewith, or on account of which the said instrument was given we will immediately notify the Company at its principal offices in the City of New York.

FOURTH: The Company may at any time hereafter take such steps at it may deem necessary or proper to obtain its release from any and all liability under the said instrument, or under any other instrument within the meaning of Section Fifth hereof, and to secure and further indemnify itself against loss, and all damages and expenses which the Company may sustain or incur or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by us.

FIFTH: That no act or omission of the Company in notifying, amending, limiting or extending the instrument so executed by the Company shall in any wise effect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof, or other

and new obligations in its place or in lien thereof, and without notice to us being expressly waived, and in any such case, we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, limited or extended instrument or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described as length herein.

SIXTH: That it shall not be necessary for the Company to give us or either of us, notice of any act, fact, or information coming to the notice or knowledge of the Company concerning or affecting its rights or liability under any such instrument by it so executed, or our rights or liabilities hereunder, notice of all such being hereby expressly waived.

SEVENTH: That this agreement shall bond not only the undersigned jointly and severally, but also our respective heirs, executors, administrators, successors and assigns (as the case may be), until the Company shall have executed a release under its corporate seal, attested by the signature of its officers proper for the purpose.

EIGHTH: That these covenants as also all collateral securities or indemnity, if any, at any time deposited with or available to the Company concerning any bond or undertaking executed for or at the instance of us, or any of us, at the option of the Company, be available in its behalf and for its benefit and relief as well concerning any or all former and subsequent bonds or undertakings executed for us, or at the instance of us, or any of us, as concerning the bond or undertaking such covenants, collateral

securities or indemnity shall have been made, deposited or given.

NINTH: It is distinctly covenanted and agreed that it is the true and intent meaning of the provisions of this instrument among other things, that immediately upon any default on the part of the principal in said bond in performing any of the obligations thereof, or immediately upon any claim being made upon the Company, the undersigned shall pay over to and deposit with the Company in cash, the full amount of moneys or the equivalent thereof, with accrued interest if any, [13] alleged by the holder of said bond to be in the hands of said principal or the penalty of said bond.

IN WITNESS WHEREOF, We have hereunto set our hands and affixed our seals this 22d day of June, 1911.

ISAAC BLUMAUER, [Seal]

P. O. Address: Tenino, Wash.

T. F. MENTZER. [Seal]

P. O. Address: Tenino, Wash.

W. DEAN HAYS. [Seal]

P. O. Address: Tenino, Wash.

A. D. CAMPBELL.

Tenino, Wash.

DAVID COPPING.

Tenino, Wash.

STATE BANK OF TENINO

ISAAC BLUMAUER,

President.

W. DEAN HAYS,

Cashier.

State of Washington,
County of King,—ss.

On this 22d day of June, 1911, before me personally came Isaac Blumauer, T. F. Mentzer, W. Dean Hays, A. D. Campbell and David Copping, to me known and known to me to be the individuals described in and who executed the foregoing agreement and each acknowledged that he executed the same.

GEO. W. ALLEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington,
County of King,—ss.

On the 24th day of June, in the year 1911, before me personally came Isaac Blumauer, to me known, who being by me duly sworn, did depose and say: that he resides in Tenino, Wash. * * * is the President of the State Bank of Tenino, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation, that the seal affixed to the said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of the said corporation and that he signed his name to the said instrument by like order.

J. F. CANORE,
Notary Public in and for the State of Washington,
Residing at Tenino.

State of ———,
County of ———,—ss.

Before me personally came ——— to me known and

known to me to be a member of the firm of ——— described in and who executed the foregoing agreement and acknowledged that he executed the same as and for the act and deed * * * said firm. [14]

Exhibit "C" to Amended Complaint — Depository Bond.

DEPOSITORY BOND.

No. ———. Amount \$5,000.00

KNOW ALL MEN BY THESE PRESENTS, That the State Bank of Tenino as Principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business in the State of Washington, as surety, are firmly held and bound unto W. H. Britt, Treasurer of the County of Thurston, State of Washington, ——— in the sum of Five Thousand and no/100 Dollars (\$5,000.00) for the payment of which, well and truly to be made we hereby bind ourselves, our and each of our successors and assigns, jointly, firmly by these presents.

Dated this 22d day of June, A. D. 1914.

WHEREAS, the said *Princiapl*, State Bank of Tenino, has been designated by W. H. Britt, Treasurer of Thurston County, as a Depository of the current funds in the hands or possession of the said Treasurer, W. H. Britt, to be deposited in the said Bank; the amount whereof shall be subject to withdrawals, or diminution by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine and

WHEREAS, the said Bank, in consideration of such deposit and of the privilege of keeping same, has agreed to pay the County of Thurston, State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month, or any fraction thereof next preceding the crediting of said interest, which interest shall be computed and credited to the account of W. H. Britt, Treasurer of said County *or* Thurston, State of Washington and shall become thenceforth a part of such deposit.

NOW, THEREFORE, if the said State Bank of Tenino shall at the beginning of every month render to the Treasurer of the County of Thurston, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of W. H. Britt, Treasurer as aforesaid, and shall pay over the same or any part thereof, upon the check or written demand of said Treasurer, or to his successor in office, and shall calculate, credit and pay such interest, as aforesaid, and shall in all respects save and keep the said County, and the County Treasurer of the said County, harmless and indemnified for and by reason of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90, entitled "An act regulating the keeping and deposit of public funds in Banks by the several Treas-

urers of the State of Washington" passed by the Legislature of the State of Washington at its tenth regular session, in the year 1907, then this obligation shall be void and of no effect, otherwise to be and remain in full force and effect.

PROVIDED:

1. That the National Surety Company, Surety on said bond, [15] shall have the right to terminate its liability under this obligation by serving notice of its election so to do upon the said Treasurer, and the said Surety shall be discharged from any and all liability hereunder for any default of the said State Bank of Tenino, Principal occurring after the expiration of thirty (30) days after the service of such notice.

2. The Surety shall only be liable for such proportion of the total loss or damage sustained by said Obligee, by reason of any default of the Principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to, and in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond.

By _____,
President.

By _____,
Attest: _____
Cashier.

Attest: _____

**Answer of A. D. Campbell and Jessie E. Campbell,
His Wife.**

Come now the defendants A. D. Campbell and Jessie E. Campbell (pleaded herein as "Jane Doe" Campbell), and for answer to the plaintiff's complaint herein, admit, deny and allege:

I.

Defendants deny knowledge or information sufficient to form a belief as to the allegations made and contained in paragraph I of the plaintiff's complaint and therefore deny the same.

II.

Defendants admit paragraph II thereof.

III.

Defendants admit paragraph III thereof.

IV.

Defendants deny that on and immediately prior to the 22d day of June, 1911, and from then on continuously and after June 22, 1914, that A. D. Campbell, acting for and on behalf of himself and his co-defendant Jessie E. Campbell, in conjunction with other officers, stockholders and directors of the said State Bank of Tenino, desired to secure the deposit of certain moneys belonging to Thurston County, Washington, and in the possession of the County Treasurer of Thurston County, Washington.

V.

Defendants deny knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph V thereof and therefore deny the same. [17]

VI.

Defendants admit the matters and things alleged and set forth in paragraph VI thereof.

VII.

Answering paragraph VII thereof defendants deny as their part of the transaction heretofore set forth, in paragraph VI of the plaintiff's complaint, that in order to induce the plaintiff to execute the bond therein mentioned, the defendant A. D. Campbell acting for himself and his co-defendant Jessie E. Campbell, in conjunction with Isaac Blumauer, W. Dean Hays, T. F. Mentzer, and David Copping, agreed to execute, and thereupon did execute and deliver to the plaintiff the certain contract of indemnity, Exhibit "B," referred to in the said paragraph, but the defendants admit that the defendant A. D. Campbell, with the other persons mentioned in the said paragraph VII, did execute the said agreement, Exhibit "B."

VIII.

Defendants deny knowledge or information sufficient to form a belief as to whether or not, on the 22d day of June, 1914, the State Bank of Tenino, by and through the defendants Isaac Blumauer and W. Dean Hays, its president and cashier, respectively, requested the plaintiff herein that the said bond, Exhibit "A," be renewed, and therefore deny the same; defendants deny that acting on the said obligation and relying sole and wholly upon the defendant's agreement and contract of indemnity Exhibit "B," that the plaintiff did execute the bond requested for Five Thousand (5,000) Dollars to se-

cure the repayment to the County Treasurer of Thurston County, Washington, of any sums deposited by him in the said State Bank of Tenino, or any sum deposited in the said State Bank of Tenino as in said paragraph alleged. [18]

IX.

Answering paragraph IX thereof defendant admits that the State Bank of Tenino closed its doors and ceased longer to transact business on the 19th day of September, 1914, and that on or about October 5th, 1914, Roy A. Langley was appointed and thereafter qualified, and at all times since has been the qualified and acting receiver thereof and denies each and every other allegation in said paragraph contained.

X.

Defendants admit the allegation made and contained in paragraph X thereof.

XI.

Defendants deny knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph XI thereof and therefore deny the same.

XII.

Defendants deny knowledge or information sufficient to form a belief as to the matters and things alleged in and set forth in paragraph XII thereof and therefore deny the same.

XIII.

Answering paragraph XIII thereof the defendants admit that the plaintiff herein made demand upon the defendants to pay certain moneys to the

treasurer of Thurston County, Washington.

XIV.

Defendants admit that they refused to comply with the said demand as alleged in paragraph XIV of the said complaint and deny knowledge or information sufficient to form a belief as to each and every other allegation in the said paragraph contained and therefore deny the same.

XV.

Defendants deny knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph [19] XV thereof and therefore deny the same.

XVI.

Defendants admit the allegation in paragraph XVI thereof.

And further answering the said complaint, and as a first affirmative defense thereto, defendants allege:

I.

That on the 22d day of June, A. D. 1911, the State Bank of Tenino was a corporation, organized and existing under and by virtue of the laws of the State of Washington engaged in a general banking business in the town of Tenino, in Thurston County, Washington; that on said date one Robert Marr was the duly elected, qualified and acting County Treasurer of Thurston County, Washington.

II.

That on or about the 22d day of June, 1911, the said Robert Marr, as such County Treasurer, had on deposit in the said State Bank of Tenino certain funds, the exact amount thereof the defendants are

at this time unable to state, and that in order to secure the repayment of the said moneys by the said State Bank of Tenino to the said Robert Marr, the plaintiff herein executed its certain depository bond or undertaking in writing, a copy of which is attached to plaintiff's complaint herein, marked Exhibit "A" and made a part hereof by reference.

III.

That the term of office of the said Robert Marr as County Treasurer of Thurston County, Washington, expired and terminated under the laws of the State of Washington, on the 8th day of January, A. D. 1913, and the said depository bond, Exhibit "A," by its terms and conditions also expired and terminated on the said 8th day of January, A. D. 1913.
[20]

IV.

That to indemnify the said plaintiff because of any loss or damage by reason of or in consequence of its executing the said depository bond, Exhibit "A" to the said Robert Marr, individually and as County Treasurer of Thurston County, Washington, and not otherwise, the defendants A. D. Campbell, together with his codefendants Isaac Blumauer, W. Dean Hays, T. F. Mentzer and David Copping, executed and delivered to the plaintiff their certain agreement and undertaking in writing, a copy of which is attached to the plaintiff's complaint herein, marked Exhibit "B" and made a part thereof.

V.

That the said State Bank of Tenino did, in the due and ordinary course of business promptly pay the

said Robert Marr, County Treasurer, upon demand and presentation of proper and valid checks all moneys and proceeds of all checks etc., which were then or thereafter deposited with, transferred or placed in charge of the said bank by or on behalf of the said Treasurer and kept and held harmless the said Robert Marr individually and as such County Treasurer from all liability, loss and damage by reason of the deposit or delivery of any funds, checks or moneys on behalf of the said Robert Marr to date, and fully performed each and every duty, obligation and condition arising out of or connected with the deposits or delivery of funds to it by or in behalf of the said Robert Marr as such treasurer, and fully performed all the conditions and obligations on it imposed under the terms and conditions of the agreement, Exhibit "A" during the whole of the period covered by it and during the entire duration of the said bond, Exhibit "A," to wit, from the 22d day of June, 1911, until and including the 8th day of January, A. D. 1913. [21]

Defendants further answering the said complaint and as a second affirmative defense thereto, allege:

I.

Defendants hereby reiterate and adopt as though fully set forth herein the allegations made and contained in paragraph I of their first affirmative defense.

II.

Defendants hereby reiterate and adopt as though fully set forth herein the allegations made and con-

tained in paragraph II of their first affirmative defense.

III.

That on or about the 22d day of June, A. D. 1911, the said Robert Marr, as such County Treasurer, had on deposit in the State Bank of Tenino certain funds, the exact amount thereof the defendants are at this time unable to state, and that in order to secure the repayment of the said moneys by the said State Bank of Tenino to the said Robert Marr, the plaintiff herein, executed its certain depository bond or undertaking in writing a copy of which is attached to the plaintiff's complaint, marked Exhibit "A" and made a part thereof by reference.

IV.

Defendants hereby reiterate and adopt the allegations made and contained in paragraph IV of their first affirmative defense herein as though fully set forth herein.

V.

Defendants hereby reiterate and adopt as though fully set forth all of the allegations made and contained in paragraph V of their first affirmative defense.

VI.

That on or about the 29th day of May, A. D. 1914, one [22] W. H. Britt, the duly elected, qualified and acting Treasurer of Thurston County, Washington, and successor of the said Robert Marr, former treasurer, fully released, canceled and discharged the said depository bond Exhibit "A" and fully released and relieved and discharged the plaintiff of all liabil-

ity thereunder, and surrendered up and delivered the said bond to the plaintiff, and the defendant was thenceforth and thereafter and at all times since has been fully discharged and relieved of all liability thereon or responsibility thereunder.

VII.

That at the time of the cancellation and discharge of plaintiff's liability on the said bond and the surrendering up and delivery thereof, and at all times prior thereto the said State Bank of Tenino had fully performed all and singular the terms and conditions of the said bond and every part thereof on its part to be performed.

VIII.

That by reason of the cancellation and discharge of the plaintiff from further liability on the said depository bond and by reason of the surrendering up and delivery thereof to the plaintiff as herein alleged, the said indemnity agreement or undertaking Exhibit "B" was fully released, satisfied and discharged.

WHEREFORE defendants having fully answered the said complaint, pray that the plaintiff's complaint may be dismissed and that they may go hence with their costs.

BATES, PEER & PETERSON,
1107 National Realty Building,
Tacoma, Washington,

Attorneys for Defendants, A. D. Campbell and Jessie
E. Campbell.

(Filed May 24, 1915.) [23]

Second Amended Answer of T. F. Mentzer and Elizabeth E. Mentzer, His Wife, and Eva Copping, Wife of David Copping, Deceased, to the Amended Complaint.

Come now the defendants, T. F. Mentzer and Elizabeth E. Mentzer, his wife, and Eva Copping, wife of the said David Copping (the said David Copping having departed this life subsequent to the commencement of this action, and his wife Eva Copping, being his sole devisee, and having succeeded to all of his rights), and for a second amended answer to the amended complaint herein deny, admit and allege as follows, to wit:

I.

These answering defendants admit the allegations of paragraph I of the amended complaint.

II.

These answering defendants admit paragraph II thereof.

III.

These answering defendants admit paragraph III of the said amended complaint.

IV.

These answering defendants deny that on and immediately prior to the 22d day of June, 1911, and from thence on continuously to and after June 22, 1914, the defendant T. F. Mentzer, acting on behalf of himself and his codefendant Elizabeth E. Mentzer, and in conjunction with other officers and stockholders and directors of the said State Bank of Tenino desired to secure the deposit of certain moneys be-

longing to the treasurer of Thurston County, Washington, and allege that the said defendants T. F. Mentzer ceased to be a director of the said State Bank of Tenino on the 1st day of May, 1912, and has not been a director thereof since. [24]

V.

These answering defendants admit the allegations of paragraph V of the amended complaint.

VI.

These answering defendants admit the allegations in paragraph VI of the said complaint, except that they deny that the application for the said bond was for a bond to run to the County Treasurer of Thurston County, Washington, and allege that the said bond was applied for to run to Robert Marr as County Treasurer of Thurston County, Washington, and to none other.

VII.

Answering paragraph VII of the said complaint, these answering defendants deny as their part of the transaction heretofore set forth in paragraph VI of the amended complaint herein and as admitted in paragraph VI of the answer herein that in order to induce the plaintiff to execute the bond therein mentioned, the defendant T. F. Mentzer, acting for himself and his codefendant, Elizabeth E. Mentzer, and the defendant David Copping, acting for himself and his codefendant Eva Copping, in connection with Isaac Blumauer, W. Dean Hays, and A. D. Campbell, agreed to execute, and thereupon did execute and deliver to the plaintiff a certain contract of indemnity, Exhibit "B," referred to in the said

paragraph, or the alterations, changes, modifications, amendments, limitations, extensions, or renewals thereof, or the substitution of other or new obligations in the place or in lieu thereof; but these answering defendants admit that the defendants T. F. Mentzer and David Copping, with the other persons named in the said paragraph of said complaint, did execute said Exhibit "B."

VIII.

These answering defendants deny any knowledge or information sufficient to form a belief as to whether or not on the said 22d day of June, 1914, the State Bank of Tenino, by and through the defendants [25] Isaac Blumauer and W. Dean Hays, its president and cashier, respectively, requested the plaintiff herein that the said bond Exhibit "A," be renewed, and therefore deny the same. These answering defendants deny that acting on the said application and relying solely and wholly or at all on the defendant's agreement and contract of indemnity Exhibit "B," that the plaintiff did execute the bond for Five Thousand (5,000) Dollars, to secure the repayment to the County Treasurer of Thurston County, Washington, of any sum deposited by him in the said State Bank of Tenino, or any sum deposited in the said State Bank of Tenino, as the said paragraph alleges, and deny that either Robert Marr individually, or the Treasurer of Thurston County, Washington, or any other person, as treasurer of Thurston County, Washington, had county funds, or any funds on deposit in the said State Bank of

Tenino, continuously from June 22, 1911, until September 19, 1914.

IX.

Answering paragraph IX thereof these answering defendants admit that the State Bank of Tenino closed its doors and ceased longer to transact business on the 19th day of September, 1914, and that on or about the 5th day of October, 1914, Ray A. Langley was appointed and thereafter qualified and at all times since has been the qualified and acting receiver thereof, and denies each and every other allegation in the said paragraph contained.

X.

These answering defendants admit the allegations made and contained in paragraph X of the said complaint.

XI.

These answering defendants deny knowledge or information sufficient to form a belief as to the truth or falsity of the matters and things set forth in paragraph XI of the said complaint, and therefore deny the same. [26]

XII.

These answering defendants deny knowledge or information sufficient to form a belief as to the truth or falsity of the matters and things set forth in paragraph XII of the said complaint, and therefore deny the allegation that the County Treasurer of Thurston County had on deposit in the State Bank of Tenino \$13,202.96 on said September 19, 1914, or any other sum.

XIII.

Answering paragraph XIII of the said complaint these answering defendants herein admit that plaintiff made demand on defendants T. F. Mentzer and David Copping to pay certain moneys to the treasurer of Thurston County, Washington.

XIV.

These answering defendants admit that they refused to comply with the said demand as alleged in paragraph XIV of said complaint, and deny knowledge or information sufficient to form a belief as to the truth or falsity of each and every other allegation in said paragraph contained, and therefore deny the same.

XV.

These answering defendants deny knowledge or information sufficient to form a belief as to the truth or falsity of the matters and things set forth in paragraph XV of the said complaint and therefore deny the same.

XVI.

These answering defendants admit the allegations of paragraph XVI of the said complaint.

XVII.

That subsequent to the commencement of the above-entitled cause the defendant David Copping departed this life; that no children had ever been born to the said David Copping and Eva Copping, and that he died intestate and all of the moneys and property owned and [27] left by the said deceased at the time of his death was acquired during the marriage of the said deceased David Copping, and his wife

Eva Copping, and that the defendant Eva Copping, became, as your defendants are informed and believe, the sole and only owner of all of the said community property of the said deceased and herself and succeeded to all of his obligations.

For a further and first affirmative defense, these answering defendants allege:

I.

That on the 22d day of June, A. D. 1911, the State Bank of Tenino was a corporation organized and existing under the laws of the State of Washington, and engaged in a general banking business at Tenino, in Thurston County, State of Washington, and that on the said day one Robert Marr was the duly elected, qualified and acting treasurer of Thurston County, Washington.

II.

That on or about the 22d day of June, 1911, the said Robert Marr, as such treasurer, had a deposit in the said State Bank of Tenino certain funds, the exact amount thereof the defendants are at this time unable to state, and that in order to secure the repayment of the said money by the said State Bank of Tenino to the said Robert Marr, the plaintiff herein executed a certain depositary bond or undertaking in writing a copy of which is attached to the plaintiff's Complaint herein, marked Exhibit "A," and made a part hereof by reference.

III.

That the term of office of the said Robert Marr as County Treasurer of Thurston County, Washington, expired and terminated under the laws of the State

of Washington, on the 8th day of January, A. D. 1913, and that the said depositary bond Exhibit "A," by its terms and conditions, expired and terminated on the said 8th day of January, 1913. [28]

IV.

That to indemnify the said plaintiff because of any loss or damage by reason or in consequence of its executing the said depositary bond, Exhibit "A," to the said Robert Marr, individually and as County Treasurer of Thurston County, Washington, and not otherwise, the defendants T. F. Mentzer and David Copping, together with their codefendants Isaac Blumauer, W. Dean Hays, and A. D. Campbell executed and delivered to the plaintiff their certain agreement or undertaking in writing, a copy of which is attached to the plaintiff's complaint herein, marked Exhibit "B" and made a part thereof.

V.

That the said State Bank of Tenino did and in the due and ordinary course of business promptly pay the said Robert Marr, County Treasurer, upon demand and proper presentation of proper and valid checks all moneys and proceeds of all checks, etc., which were then or thereafter deposited with, transferred to or placed in charge of said bank, by or on behalf of the said treasurer and kept and held harmless the said Robert Marr, individually and as such County Treasurer from all liability, loss and damage by reason of the deposit or delivery of any funds, checks or moneys on behalf of said Robert Marr to date, and fully performed each and every duty, obligation and condition arising out of or connected with

the deposit or delivery of funds to it by or on behalf of the said Robert Marr as such treasurer and fully performed all of the conditions and obligations on it imposed, under the terms of and conditions of the agreement, Exhibit "A," during the whole of the period covered by it, and during the entire duration of the said bond, Exhibit "A," to wit, from the 22d day of June, 1911, until and including the 8th day of January, 1913, and that by reason of the matters and things alleged in this affirmative defense, all liabilities and obligations of these answering defendants to the plaintiff ceased, and determined by reason of the expiration of the [29] said bond, and the faithful compliance with the conditions thereof by the said State Bank of Tenino.

FOR A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, these answering defendants allege:

I.

That on the 22d day of June, 1911, the State Bank of Tenino was a corporation organized and existing under the laws of the State of Washington, and engaged in a general banking business at Tenino, Thurston County, State of Washington, and that on the said day one Robert Marr was the duly elected qualified and acting treasurer of Thurston County, Washington.

II.

That on or about the 22d day of June, 1911, the said Robert Marr, as such treasurer, had a deposit in the said State Bank of Tenino of certain funds, the exact amount thereof the defendants are at this

time unable to state, and that in order to secure the repayment of the said money by the said State Bank of Tenino to the said Robert Marr, the plaintiff herein executed a certain depositary bond or undertaking in writing, a copy of which is attached to the plaintiff's complaint herein, marked Exhibit "A" and made a part hereof by reference.

III.

That the term of office of the said Robert Marr, as county treasurer of Thurston County, Washington, expired and terminated under the laws of the State of Washington, on the 8th day of January, A. D. 1913, and that the said depositary bond Exhibit "A" by its terms and conditions expired and terminated on the said 8th day of January, 1913.

IV.

That to indemnify the plaintiff because of any loss or damage by reason or in consequence of its executing the said depositary bond Exhibit "A," to the said Robert Marr, individually, and as county [30] treasurer of Thurston County, Washington, and not otherwise, the defendants T. F. Mentzer and David Copping, together with their codefendants, Isaac Blumauer, W. Dean Hays, and A. D. Campbell, executed and delivered to the plaintiff their certain agreement or undertaking in writing, a copy of which is attached to the plaintiff's Complaint herein, marked Exhibit "B" and made a part thereof.

V.

That the said State Bank of Tenino did and in the due and ordinary course of business promptly pay to the said Robert Marr, County Treasurer, upon de-

mand and presentation of proper and valid checks, all moneys and proceeds of all checks, etc., which were then or thereafter deposited with, transferred to or placed in charge of said bank, by or on behalf of the said treasurer and kept and held harmless the said Robert Marr, individually and as such County Treasurer from all liability, loss and damage by reason of the deposit or delivery of any money, funds, checks, or moneys on behalf of said Robert Marr, to date, and fully performed each and every duty, obligation and condition arising out of or connected with the deposit or delivery of funds to it by or on behalf of the said Robert Marr as such Treasurer and fully performed all of the conditions and obligations on it imposed under the terms and conditions of the agreement Exhibit "A" during the whole of the period covered by it, and during the entire duration of the said bond, Exhibit "A," to wit, from the 22d day of June, 1911, until and including the 8th day of January, 1913, and that by reason of the matters and things alleged in this second affirmative defense, all liabilities and obligations of these answering defendants to the plaintiff ceased and determined by reason of the expiration of the said bond, and the faithful compliance with the conditions thereof by the said State Bank of Tenino.

VI.

That on or about the 29th day of May, A. D. 1914, one [31] W. H. Britt, the duly elected, qualified and acting County Treasurer of Thurston County, Washington, and successor of the said Robert Marr, former treasurer, fully released, cancelled and dis-

charged the said depository bond, Exhibit "A" and fully released and relieved and discharged the said plaintiff of all liability thereunder and surrendered up and delivered the said bond to the plaintiff, and the defendants were therefor and thereafter, and at all times since have been fully discharged and released of all liability thereon or responsibility thereunder.

VII.

That at the time of the cancellation and discharge of plaintiff's liability on the said bond and the surrendering and delivering thereof, and at all times prior thereto, the said State Bank of Tenino had fully performed all and singular the terms and conditions of the said bond and every part thereof on its part to be performed.

VIII.

That by reason of the cancellation and discharge of the plaintiff from further liability on the said depository bond and by reason of the surrendering up and delivery thereof to the plaintiff as herein alleged, the said indemnity agreement or undertaking, Exhibit "B," was fully released, set aside and discharged.

WHEREFORE the defendants pray that the plaintiff go hence without day and take nothing, and these answering defendants may be dismissed and that they have their costs and disbursements of suit herein, and for such other and further relief as to

the court may seem meet in the premises.

Attorneys for Defendants T. F. Mentzer, Elizabeth
E. Mentzer, David Copping and Eva Copping.
(Filed May 24, 1916.) [32]

**Reply to the Answer of Defendants A. D. Campbell
and Jessie Campbell, His Wife.**

Comes now the plaintiff and replying to the answer of A. D. Campbell and Jessie Campbell his wife, admits, denies and alleges as follows:

REPLY TO FIRST AFFIRMATIVE DEFENSE.

I.

Plaintiff admits the allegations contained in paragraph I.

II.

Plaintiff admits that the State Bank of Tenino as principal, and plaintiff as surety executed and delivered a certain depository bond, a copy of which is attached to plaintiff's amended complaint, marked Exhibit "A," but plaintiff denies the other allegations, matters and things contained and set forth in paragraph II.

III.

Plaintiff admits that the term of office of Robert Marr as County Treasurer of Thurston County, expired on the 8th day of January, 1913, by the election and qualification of W. H. Britt, as such Treasurer, who at once succeeded to such office with all the duties and obligations thereof, but plaintiff denies each and every other allegation, matter and thing contained in paragraph III.

IV.

Plaintiff admits that the defendants named in paragraph IV executed and delivered to plaintiff their certain undertaking in writing, a copy of which is attached to plaintiff's amended complaint, and marked Exhibit "B" and made a part thereof. But [33] plaintiff denies each and every other allegation contained and set forth in said paragraph.

V.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph V.

REPLY TO THE SECOND AFFIRMATIVE
DEFENSE.

I.

Plaintiff admits the allegations contained in paragraph I.

II.

Plaintiff admits that the State Bank of Tenino, as principal, and plaintiff, as surety, executed and delivered a certain depository bond, a copy of which is attached to plaintiff's amended complaint, and marked Exhibit "A." Plaintiff denies the other allegations, matters and things contained and set forth in paragraph II.

III.

Plaintiff admits that the term of office of Robert Marr as County Treasurer of Thurston County, expired on the 8th day of January, 1913, by the election and qualification of W. H. Britt as such Treasurer, who at once succeeded to such office with all the duties and obligations thereof, but plaintiff denies

each and every other allegation, matter and thing contained in paragraph III.

IV.

Plaintiff admits that the defendants named in paragraph IV executed and delivered to plaintiff their certain undertaking in writing, a copy of which is attached to plaintiff's amended complaint and marked Exhibit "B" and made a part thereof, but plaintiff denies each and every other allegation contained and set forth in said paragraph IV. [34]

V.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph V.

VI.

Plaintiff admits that on the 29th day of May, 1914, one W. H. Britt was the duly elected, qualified and acting county treasurer of Thurston County, Washington, and successor of said Robert Marr, former treasurer, but denies each and every other allegation, matter and thing contained and set forth in paragraph VI. And especially denies that said bond, Exhibit "A" was released, cancelled or discharged, or that plaintiff was released, relieved or discharged from liability thereon, but plaintiff admits that said bond was renewed by the execution and delivery of the bond, Exhibit "C," a copy of which is attached to plaintiff's amended complaint, and as alleged and set forth in paragraph VIII of plaintiff's amended complaint.

VII.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph VII.

VIII.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph VIII.

WHEREFORE plaintiff prays judgment according to the prayer of its amended complaint on file herein.

C. B. WHITE,
FLETCHER & EVANS.

(Filed May 29, 1916.) [35]

**Reply to Second Amended Answer of T. F. Mentzer
and Elizabeth E. Mentzer, and Eva Copping,
Wife of David Copping, Deceased.**

Comes now the plaintiff and replying to the second amended answer filed herein by defendants T. F. Mentzer and Elizabeth E. Mentzer, his wife, and Eva Copping, admits, denies and alleges as follows:

**REPLY TO THE ANSWER RAISING THE
GENERAL ISSUE.**

I.

Replying to paragraph IV plaintiff denies that it has any knowledge or information sufficient to form a belief as to whether or not defendant T. F. Mentzer ceased to be a director of the State Bank of Tenino on the 1st day of May, 1912, or as to when or if at all he ever ceased to be a director of said bank, or as to whether he has not since been, and is not still a director of said bank.

II.

Replying to paragraph VI it denies that the bond therein referred to was applied for to run to Robert

Marr as County Treasurer of Thurston County, Washington; denies that said bond was applied for, for any purpose other than to secure a repayment to the County Treasurer of Thurston County, Washington, for deposits to be made by the county in said bank.

III.

Plaintiff specifically admits the allegations, matters and things contained and set forth in paragraph XVII.

REPLY TO THE FIRST AFFIRMATIVE DEFENSE.

I.

Plaintiff admits the allegations, matters and things contained and set forth in paragraph I. [36]

II.

Plaintiff admits that the State Bank of Tenino, as principal, and plaintiff, as surety, executed and delivered a certain depository bond, a copy of which is attached to plaintiff's amended complaint and marked Exhibit "A." Plaintiff denies the other allegations, matters and things contained and set forth in paragraph II.

III.

Plaintiff admits that the term of office of Robert Marr as County Treasurer of Thurston County, expired on the 8th day of January, 1913, by the election and qualification of W. H. Britt, as such treasurer who at once succeeded to such office with all the duties and obligations thereof, but plaintiff denies each and every other allegation, matter and thing contained in paragraph III.

IV.

Plaintiff admits that the defendants named in paragraph IV executed and delivered to plaintiff their certain undertaking in writing, a copy of which is attached to plaintiff's amended complaint and marked Exhibit "B" and made a part thereof. But plaintiff denies each and every other allegation contained and set forth in said paragraph.

V.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph V.

REPLY TO SECOND AFFIRMATIVE DEFENSE.

I.

Plaintiff admits the allegations contained in paragraph I.

II.

Plaintiff admits that the State Bank of Tenino as principal [37] and plaintiff as surety, executed and delivered a certain depository bond, a copy of which is attached to plaintiff's amended complaint, and marked Exhibit "A." Plaintiff denies the other allegations, matters and things contained and set forth in paragraph II.

III.

Plaintiff admits that the term of office of Robert Marr as County Treasurer of Thurston County, expired on the 8th day of January, 1913, by the election and qualification of W. H. Britt, as such treasurer, who at once succeeded to such office with all the duties and obligations thereof, but plaintiff denies each and every other allegation, matter and

thing contained in paragraph III.

IV.

Plaintiff admits that the defendants named in paragraph IV executed and delivered to plaintiff their certain undertaking in writing, a copy of which is attached to plaintiff's amended complaint and marked Exhibit "B" and made a part thereof. But plaintiff denies each and every other allegation contained and set forth in said paragraph IV.

V.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph V.

VI.

Plaintiff admits that on the 29th day of May, 1914, one W. H. Britt was the duly elected, qualified and acting county treasurer of Thurston County, Washington, and successor of said Robert Marr, former treasurer, but denies each and every other allegation, matter and thing contained and set forth in paragraph VI. And especially denies that said bond, Exhibit "A" was released, cancelled or discharged or that plaintiff was released, relieved or discharged from liability thereon, but plaintiff admits that said bond was renewed by the execution and delivery of the bond, Exhibit [38] "C," a copy of which is attached to plaintiff's amended complaint, and as alleged and set forth in paragraph VIII of plaintiff's amended complaint.

VII.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph VII.

VIII.

Plaintiff denies each and every allegation, matter and thing contained and set forth in paragraph VIII.

WHEREFORE plaintiff prays judgment according to the prayer of its amended complaint on file herein.

C. B. WHITE,
FLETCHER & EVANS,
Attorneys for Plaintiff.

(Filed May 29, 1916.) [39]

Judgment.

On the 15th day of November, A. D. 1916, this cause came on for trial, plaintiff appearing with C. B. White and Fletcher & Evans, its attorneys, defendants T. F. Mentzer and Elizabeth E. Mentzer, his wife, A. D. Campbell and Jessie E. Campbell, his wife, Eva Copping, and Eva Copping, as administratrix of the estate of David Copping, deceased, appearing with P. M. Troy and Bates, Peer & Peterson, their attorneys, and a jury having been duly empanelled and sworn to try said cause, the trial thereof proceeded by introduction of evidence and proof in plaintiff's behalf; and at the conclusion thereof and when plaintiff rested its case, defendants jointly and severally by motion challenged the sufficiency of the evidence offered in plaintiff's behalf to entitle it to the relief demanded in its complaint, or to any relief, and moved the court for a judgment of nonsuit and dismissal of plaintiff's action, and for costs; whereupon, said

motion was argued to the court by counsel for the respective parties, and upon consideration thereof and on the 16th day of December, A. D. 1916, the Court being of the opinion that the said motion was well taken, granted the same and discharged the jury from further consideration of said cause;

It is therefore ORDERED AND ADJUDGED that plaintiff's action herein be and the same is hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that defendants have and recover their costs and disbursements herein to be taxed; to all of which plaintiff excepts, which exception is hereby allowed.

Dated February 5th, 1917.

EDWARD E. CUSHMAN,

Judge.

(Filed Feb. 5, 1917.) [40]

Order Extending Time Ten Days from February 6, 1917, to Prepare, etc., Bill of Exceptions.

IT IS BY THE COURT ORDERED that the July, 1916, term of this court be and is extended for a period of ten (10) days from this date for the purpose of preparing, filing and settling bill of exceptions and for filing assignment of errors and petition for writ of error, making and entering order allowing a writ of error and fixing the amount of the bond on said writ of error and supersedeas.

Done in open court this 6th day of February, A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed Feb. 6, 1917.) [41]

**Order Extending Time to February 19, 1917, for
Hearing of Settlement of Bill of Exceptions.**

This being the time fixed for hearing on plaintiff's bill of exceptions and for settling and certifying the same, and the Court being engaged in other matters, and with the consent of plaintiff and defendants, it is by the Court ordered that this hearing be and is continued to the 19th day of February, 1917, at 10 o'clock A. M. of said day, at which time said matter will be heard.

Done in open Court this 13th day of February, 1917.

EDWARD E. CUSHMAN,
District Judge.

(Filed Feb. 13, 1917.) [42]

**Order Extending Time to March 5, 1917, for Hearing,
etc., on Bill of Exceptions.**

On consent of plaintiff and defendants appearing by their respective attorneys, it is by the Court ordered that the time for hearing and certifying the Bill of Exceptions be and is continued to March 5th, 1917.

EDWARD E. CUSHMAN,
Judge.

(Filed Feb. 19, 1917.) [43]

Statement of Facts and Bill of Exceptions.

BE IT REMEMBERED that heretofore on the 15th day of November, 1916, the above-entitled cause coming on regularly for trial before Honorable E. E. Cushman, Judge of the above-entitled court, and a jury, and the plaintiff being represented by its attorneys John D. Fletcher, Robert E. Evans and C. B. White, and the defendant T. F. Mentzer and Elizabeth E. Mentzer his wife, and Eva Copping, wife of David Copping, deceased, by their attorney P. M. Troy, and the defendants A. D. Campbell and Jessie E. Campbell, his wife, by their attorneys C. O. Bates, and Charles T. Peterson, the defendants Isaac Blumauer and W. Dean Hays and Ora J. Hays, his wife, not appearing, the jury having been called and sworn to try the cause, counsel for plaintiff having stated to the jury the facts which plaintiff expects to prove in the trial hereof, the following proceedings were had and done:

Testimony of George W. Allen, for Plaintiff.

GEORGE W. ALLEN, a witness called by the plaintiff, being duly sworn testifies as follows:

Direct Examination by Mr. FLETCHER.

Thereupon the following proceedings were had:

Mr. Peterson for all defendants appearing:

“If the Court please, the defendants appearing jointly and severally object to the introduction of any evidence under the complaint as filed on the grounds and for the reason that it does not state a cause of action against the defendants or either of

(Testimony of George W. Allen.)

them. I do not care to argue the matter.

The COURT.—Objection overruled, exception allowed.

Witness ALLEN then testified:

My name is George W. Allen; I am and have been the general agent of the plaintiff, National Surety Company for Western [44] Washington, located at Seattle since early in 1911. I have been in the surety business connected with the plaintiff for the past fourteen years.

I, as general agent of the plaintiff, had negotiated with the Tenino State Bank of Tenino, Washington, regarding the furnishing of the depository bond by that bank to secure deposits of moneys of Thurston County. That as a result of such negotiations the National Surety Company, the plaintiff, executed a five thousand dollar depository bond as surety for the State Bank of Tenino to secure the Treasurer of Thurston County for deposits of county moneys.

Witness identifies bond dated June 22d, 1911 as the bond referred to.

Thereupon the following proceedings were had:

Mr. FLETCHER.—We have the file of the clerk's office of Thurston County containing this bond and offer in evidence the file.

Mr. PETERSON.—The defendants object on the ground that it is incompetent, irrelevant and immaterial.

The Court overruled the objection and allowed defendants an exception, and the file was admitted in

evidence as Plaintiff's Exhibit 1.

Mr. FLETCHER.—As this file has to be returned to the clerk's office, I will read into the record the receipts and letters attached to the bond, and will supply the record with a copy of the bond and certificate of appointment of officers.

Mr. PETERSON.—We have no objection to Mr. Fletcher's reading the papers into the record or substituting a copy of the bond and certificate of appointment of officers for the original, but do object to these receipts, letters and bond on the ground that the same are, and each of them is irrelevant and immaterial.

Objection overruled, exception allowed defendants.

[45]

Mr. FLETCHER.—The first paper of Plaintiff's Exhibit 1 is on the letter-head of Geo. W. Allen & Co. Liability Surety Bonds, Burglarly, Fire and General Insurance. Dated June 5, 1912. This is a receipt and is as follows:

Plaintiff's Exhibit 1—Receipt, June 22, 1912, Allen & Co. to State Bank of Tenino.

“STATE BANK OF TENINO,

Washington. 6/22/12.

Covers depository bond to Robert Marr, Treasurer of Thurston County, number 596,917, amount \$5,000, term one year, premium \$25.00, paid 6/10/12.

GEO W. ALLEN & CO., per A.”

Defendants object on the ground that it is irrelevant and immaterial. Objection overruled, exception allowed defendants.

It is agreed that any objection made by any of the defendants is for the benefit of all the defendants appearing.

Mr. FLETCHER.—Attached to the paper just read is a letter on the letter-head of State Bank of Tenino, United States Depository, Isaac Blumauer, President, T. F. Mentzer, Vice-president, W. Dean Hays, Vice-president and Cashier. A. D. Campbell, Assistant Cashier. Dated Tenino, Washington, June 7, 1912, and reads as follows:

Letter, June 7, 1912, State Bank of Tenino to Marr.
“Hon. Robert Marr, Treasurer, Olympia, Washington.

Enclosed herewith is letter from National Surety Company in re, \$5,000 depository bond which indicates that same is continuous upon payment of the premium which we have this day remitted. But if there is any further evidence on the payment we will be glad to furnish it. With kind personal regards I am,

Very truly yours,

STATE BANK OF TENINO,
W. DEAN HAYS, V-President.”

Defendants make the same objection as to the former paper. Objection overruled and exception allowed defendants.

Mr. FLETCHER.—I will now read another receipt which on the same letter-head as the previous receipt, that is, on the letter-head [46] of Geo. W. Allen & Co., dated June 22, 1913, to the State Bank of Tenino, W. Dean Hays, Cashier, Tenino,

Washington. Covers depository bond to the Treasurer of Thurston County, Washington, from the National Surety Company, numbered 596,917, amount \$5,000, term one year, premium \$25. Paid 6/12/13. Geo. W. Allen & Co.

Attached to this receipt is the following letter on the letter-head of the State Bank of Tenino with the same officers as the previous letter, dated Tenino, June 13, 1913, and reads as follows:

Letter, June 13, Hays to Britt.

“Mr. W. H. Britt, County Treasurer,
Olympia, Washington.

Dear Sir: Enclosed please find herewith receipt for premium on bond No. 596,617, National Surety Company for \$5,000 which expires on June 22, which continues same in force for one year. Thanking you to acknowledge receipt of the same I am

Very truly yours,

W. DEAN HAYS,

Cashier.”

The defendants make the same objections as to the former exhibit. Objection overruled, exception allowed to defendants.

Mr. FLETCHER.—Attached to these same papers I will read the following into the record which is on the letter-head of the National Surety Company, Seattle, Washington, dated January 24th, 1913. Addressed to W. Dean Hays, Cashier State Bank of Tenino, Tenino, Washington. Reads as follows:

Letter, January 24, 1913, Welch to Hays.

“Dear Sir: Acknowledging your esteemed favor of the 20th inst. herewith duplicate receipt which

(Testimony of George W. Allen.)

renews your depository bond in favor of Treasurer of Thurston County, Washington, from June 22, 1912 until June 22nd, 1913. Trusting this is satisfactory, and with kindest regards I am,

Yours very truly,

EDW. P. WELCH, Secy." [47]

Attached to this letter is a duplicate receipt which is the same as the first paper above read into the record.

To the foregoing offer defendants make the same objection as to the former offer. Objection overruled, and exception allowed.

Mr. Fletcher then read to the jury the bond dated June 22d, 1911, a copy of which it was agreed might be substituted for the original in the record.

Witness Allen then proceeding, testified as follows:

At the time of executing this bond which has been offered in evidence in the file, Plaintiff's Exhibit 1, the plaintiff required the directors and officers of the Tenino State Bank and their wives to execute and deliver to the plaintiff an indemnity agreement dated June 22d, 1911. This agreement was identified by the witness and offered in evidence under permission of the Court to substitute a copy of the original was in a dilapidated condition.

Defendants objected to the offer on the ground that it is immaterial, irrelevant and incompetent, admitting, however, the execution of the paper.

Objection overruled, exception allowed, and the indemnity agreement was admitted in evidence and

(Testimony of George W. Allen.)

marked Plaintiff's Exhibit 2.

Witness Allen proceeding testified that the premium of twenty-five dollars required by the bond was paid. That when the year from the date of the bond expired, to-wit in June, 1912, the plaintiff billed the bank for a subsequent year's premium, which was paid, and receipt sent the bank. That when this second year was about to expire, to wit, in June, 1913, plaintiff again billed the bank for a year's premium, which was paid for the ensuing year, and receipt sent the bank. The receipts are those read into the record as a part of the file, Plaintiff's Exhibit 1. That the payment of these premiums extended the life of the bond to June 22, 1914. In June, 1914, the [48] plaintiff billed the bank for the ensuing year's premium and certain correspondence was had between W. Dean Hays representing the bank as its vice-president and witness representing the National Surety Company.

Witness identified a letter from him to Vice-president Hays dated May 23, 1914, which letter was offered in evidence.

Defendants objected to the offer, not to the nature of the proofs, but on the ground that the liability if any, is on a written instrument, and acts of the State Bank of Tenino or the National Surety Company can add to or vary their contract or affect it.

Objection overruled and exception allowed defendants. The letter was admitted in evidence as Plaintiff's Exhibit 3.

Witness identified a letter addressed to him and

(Testimony of George W. Allen.)

signed by W. Dean Hays, vice-president, on the letter-head of the bank, dated May 22, 1914. The letter was offered in evidence, and the defendants objected, not to the form of the proof, but that the letter was incompetent, irrelevant and immaterial, and not shown to be done with the knowledge and acquiescence of the defendants or either of them.

Objection overruled, exception allowed defendants, and the letter admitted in evidence as Plaintiff's Exhibit 4.

Plaintiff then identifies a letter which plaintiff offered in evidence.

Defendants made the same objection as to the former offer. Objection was overruled, and exception allowed the defendants. The letter admitted in evidence as Plaintiff's Exhibit 5.

Witness identified a letter dated May 26th, 1914, from Geo. W. Allen, Mgr. to W. Dean Hays, vice-president of the State Bank of Tenino, which letter was offered in evidence by the plaintiff. The defendants made the same objection as to the former offer, and in addition that the letter stated a conclusion of the writer. [49]

Objection was overruled, exception allowed defendants, and the letter admitted in evidence as Plaintiff's Exhibit 6.

Witness identifies a letter dated June 25th, 1914, from W. Dean Hays, vice-president of State Bank of Tenino, to witness, manager of National Surety Company.

Plaintiff offered the letter in evidence, defendants

(Testimony of George W. Allen.)

made the same objections as to the former offer, that it was immaterial, irrelevant and incompetent. Objection overruled exception allowed defendant, and letter admitted in evidence as Plaintiff's Exhibit 7.

Plaintiff offered in evidence a letter dated May 26th, 1914, directed to the State Bank of of Tenino, and signed by W. H. Britt. Defendants admitted that the letter was signed by W. H. Britt who was then County Treasurer of Thurston County, Washington, but objected to the letter on the ground that it was incompetent, irrelevant and immaterial. Objection overruled, exception allowed, letter admitted as Plaintiff's Exhibit 8.

Plaintiff offered copy of a letter dated May 29th, 1914, directed to W. H. Britt, Treasurer, Olympia, Washington, signed State Bank of Tenino, under it the initial "H" representing the signature of W. Dean Hays, vice-president of the bank. The defendants objected to the letter, not on the ground that it was a copy, but that it was irrelevant and immaterial. Objection overruled, exception allowed defendants. Letter admitted in evidence as Plaintiff's Exhibit 9.

Witness Allen proceeding testified that the bond which had been admitted in evidence in the file marked Exhibit 1, was executed by the National Surety Company.

Witness then identifies an instrument, being a bond dated June 22, 1914. It was admitted by the defendants that this bond was obtained by the plaintiff from the files of the clerk's office of [50] Thurs-

(Testimony of George W. Allen.)

ton County, State of Washington.

This bond, with the endorsements on the back of it, was offered in evidence. The defendants objected on the ground that it is immaterial, incompetent and irrelevant, and not an obligation or undertaking contemplated by the indemnity agreement sued on in this action. Objection overruled and exception allowed defendants. The bond was admitted in evidence as Plaintiff's Exhibit No. 10.

Witness Allen proceeding testified that the release referred to in some of the letters that have been admitted in evidence, was a release now identified by him, being Identification No. 11. This release was offered in evidence. The offer was objected to by the defendants as immaterial, irrelevant and incompetent. Objection overruled and exception allowed defendants. The release was admitted in evidence and marked Plaintiff's Exhibit 11.

Thereupon the following took place:

Question by Mr. Fletcher to witness Allen:

"What was the purpose of making the release become effective June 22, 1914?"

Defendants object on the ground that the release speaks for itself. Objection sustained, exception allowed plaintiff.

"Mr. FLETCHER.—I will ask you, Mr. Allen, what was the purpose of obtaining the release of that first bond?"

"Mr. PETERSON.—Defendants object to that. Objection sustained, exception allowed plaintiff.

Mr. FLETCHER.—I will ask you, Mr. Allen, if be-

(Testimony of George W. Allen.)

tween the expiration of the first bond, June 22, 1911, and the coming into effect of the bond of June 22, 1914, was there any intervening period at which times the National Surety Company would not have been bound?"

"A. No, sir, I—(interrupted).

Mr. PETERSON.—We make the same objection, and also on the ground that the question calls for a conclusion." [51]

Objection sustained, exception allowed plaintiff.

"Mr. FLETCHER.—I think I have perhaps the right to show by the witness that one bond was a substitution for the other."

"The COURT.—It seems to me that everybody in the room is about as well qualified to answer the question as he is. It all seems to be in writing."

Witness Allen proceeding testified that at the time the bond of June 22, 1914, was given, the indemnity agreement which has been signed by the defendant, and introduced in evidence as Plaintiff's Exhibit 2, was in the possession of the plaintiff at its home office. There was not at that time any new or other indemnity agreement taken. This indemnity agreement has never been surrendered by the plaintiff.

Cross-examination by Mr. PETERSON.

"We will offer in evidence in connection with the witness' testimony, defendants' identifications A and B."

No objections.

(Testimony of George W. Allen.)

Whereupon defendants' identifications were admitted in evidence as Defendants' Exhibits "A" and "B."

"Mr. PETERSON.—We have no further cross-examination, the plaintiff having waived identification of the two exhibits."

Redirect Examination by Mr. FLETCHER.

Witness Allen testified that Defendants' Exhibit "A" was an application to the National Surety Company, the plaintiff, by the State Bank of Tenino for a five thousand dollars depository bond, which the plaintiff wrote for it in June 1911, the same to take effect June 22, 1911. That this exhibit is the application for the bond dated June 22d, 1911. That Defendants' Exhibit "B," dated May 3, 1914, is an application for the bond written by the plaintiff and dated June 22d, 1914. Thereupon the following took place:

"Q. (By Mr. FLETCHER.) Mr. Allen, I will ask you if on furnishing surety bonds what is or is not required regarding an application of this nature from the applicant who desires a bond. [52]

"Mr. PETERSON.—The defendants object on the ground that it is incompetent, irrelevant and immaterial."

Objection sustained, exception allowed plaintiff.

"Mr. FLETCHER.—I offer to show that it is the universal rule to require such an application."

"The COURT.—I do not know that that would change it any whether it was the only time it had ever been done or whether it had been done forever.

(Testimony of George W. Allen.)

I do not see how that touches the question. The offer will be denied, exception allowed the plaintiff."

"Q. Mr. Allen, what connection, if any, is there between an application for a bond and an indemnity agreement indemnifying against loss on the bond?"

"Mr. PETERSON.—We object to that as calling for a conclusion of the witness."

"The COURT.—I do not see the necessity for it, but I will overrule the objection and leave you the motion to strike it out in case anything objectionable creeps in."

"WITNESS.—The application for a bond is signed by the principal in the bond, the bank in this case, and it is for the purpose of giving information in connection with the application and showing the details of the bond applied for. The indemnity agreement is also signed by the applicant with other signers indemnifying the surety against loss on the bond."

"Mr. PETERSON.—We move to strike the answer on the ground that it states a conclusion of the witness as to the effect of the different instruments."

"The COURT.—Motion denied, exception allowed defendants."

"Mr. FLETCHER.—We will offer in evidence plaintiff's identification No. 12 which it is stipulated is a correct copy of the Commissioners' minutes of the Board of County Commissioners of Thurston County under date of Tuesday January 3d, 1911, and that Champion [53] B. Mann, was chairman and R. A. Cruikshank, Clerk of the Board. No objection.

(Testimony of George W. Allen.)

Whereupon the identification was admitted in evidence as Plaintiff's Exhibit 12.

"Mr. FLETCHER.—We will offer in evidence Plaintiff's Identification No. 13 under the same stipulation, except that these are the minutes of meeting on Monday January 8, 1912, and Mr. A. M. Rowe was then Chairman of the Board."

No objection.

Whereupon said identification was admitted as Plaintiff's Exhibit 13.

"Mr. FLETCHER.—We will offer in evidence under the same stipulation the Commissioners' minutes under date of January 11, 1913."

"Mr. PETERSON.—Defendants object that it is irrelevant and immaterial."

Objection overruled, exception allowed defendants.

Whereupon Identification was admitted as Plaintiff's Exhibit 14.

"Mr. FLETCHER.—We will offer in evidence under the same stipulation the Commissioners' minutes of Monday January 1st, 1914."

"Mr. PETERSON.—To which defendants make the same objection."

Objection overruled, exception allowed.

Whereupon said identification was admitted as Plaintiff's Exhibit 15.

Testimony of R. A. Langley, for Plaintiff.

R. A. LANGLEY, a witness produced on behalf of the plaintiff, being first duly sworn testified as follows:

Direct Examination by Mr. FLETCHER.

My name is R. A. Langley; I am receiver of the State Bank of Tenino. Was appointed in October, 1914. The bank closed its doors on the 17th of September, 1914. As receiver he has possession of the books of the bank, and those books show the account of Robert Marr as Treasurer of Thurston County. That under stipulation between the attorneys for plaintiff and defendant he has produced a copy of this [54] account in place of the original which copy is a correct copy of the account. That this account commenced June 20th, 1911, and ended January 8, 1913, the last date being the date of the expiration of Robert Marr's term of office as County Treasurer of Thurston County. The account was offered in evidence without objection and admitted as Plaintiff's Exhibit No. 16.

(Witness proceeds.) I have with me a copy taken from the books of the account of W. H. Britt as County Treasurer, of Thurston County, producing the copy in place of the original under the stipulation between the parties. That the account is a correct account from the books. This account commenced January 15, 1913, and ended Sept. 17, 1914. It being stipulated between the parties that this account, Plaintiff's Identification 17, covers the ac-

(Testimony of R. A. Langley.)

count of W. H. Britt as County Treasurer of Thurston County with the State Bank of Tenino, during his term of office and down to the failure of the bank. The account was admitted in evidence without objection as Plaintiff's Exhibit No. 17.

(Witness proceeds.) Under the designation of checks in the account means withdrawals by check, and under deposits means deposits in the bank from time to time by Mr. Marr as regards his account and by Mr. Britt as regards his account. Under the word balance shows the daily balance in the bank of the depositor. Plaintiff's Exhibit 17 shows the correct amount that W. H. Britt, as County Treasurer, had in the bank when the bank failed. It was admitted by the parties that this balance was \$12,853.58. Whereupon the following took place:

"Mr. FLETCHER.—Mr. Langley, I will ask you if you have your books showing how and in what manner Robert Marr as Treasurer closed his account on January 8th, 1913, as to whether or not he drew out the money, or what constituted the closing of his account.

"Mr. PETERSON.—We object to that as being irrelevant and [55] immaterial; there is no claim made here for any loss until September 19, 1914. The allegation of the complaint is that the loss was suffered on September 19, 1914, by this bank closing its doors and ceasing longer to do business."

"The COURT.—Well, as I understand it, this is regarding whether the account was fully paid when Marr went out."

(Testimony of R. A. Langley.)

“Mr. FLETCHER.—Yes.

“Mr. PETERSON.—It is not claimed that there was any loss suffered during Mr. Marr’s administration or at the close of his administration. There is no claim loss until September 19th, 1914. We are not prepared to meet anything else in this case.”

“The COURT.—Well, as Mr. Fletcher says, it is whether or not it was a continuous account or closed when Mr. Marr went out.”

“Mr. PETERSON.—What difference would it make if no loss occurred?”

“The COURT.—It might be, if this was shown, that it was simply a bond for Mr. Marr’s account; if it was fully paid when he went out that was all there was to it. They want to show that it was a continuous account; that the money never was paid, but that something else was done. Objection will be overruled, exception allowed the defendants.”

(Witness proceeds.) Mr. Marr’s account shows that there was a demand certificate given him for the amount he had in the bank closing his account. His account was debited and a demand certificate for the amount was issued to him. This was the way his account was closed. That there is no other account of Robert Marr with the bank as Treasurer. Turning to Mr. Britt’s account, this was opened on January 15th, 1913, by deposit by him with the bank of a demand certificate, being the same number of certificate and the same amount as the certificate issued to Mr. Marr. Certificate being No. 1098, and

(Testimony of R. A. Langley.)

being for \$9,974.76, and is the same number of certificate and the same amount [56] as that issued to Mr. Marr as county treasurer on January 8, 1913, when his account was closed. The deposit of this certificate was the opening of Mr. Britt's account as treasurer with the bank. Defendants object to this testimony, and move to strike out the questions and answers on the ground that the same are irrelevant, immaterial and incompetent. Objection overruled, and exception allowed defendants.

(Witness proceeds.) The minute-book of stockholders and trustees' meetings of Tenino State Bank was in his possession. This came into his hands when he took possession as Receiver of the bank. That the book submitted is the only book that he finds containing minutes of stockholders and directors' meetings. It is the only one he ever heard of the bank having. Thereupon the following took place:

"Mr. FLETCHER.—It is stipulated that during all the times mentioned in the complaint, defendants Isaac Blumauer was the owner of 11 shares of stock, defendant T. F. Mentzer of 5 shares of stock, defendant David Copping of 10 shares of stock, defendant A. D. Campbell of 10 shares of stock, and W. D. Hays of 51 shares of stock; that the capital stock of the bank was \$10,000, divided into 100 shares of \$100 each. That at all times mentioned in the minutes of stockholders and directors' meetings, commencing with January 10, 1911, defendant Isaac Blumauer

(Testimony of R. A. Langley.)

was President of the Bank and defendant W. Dean Hays its cashier."

"Mr. PETERSON.—Now, it is understood that while the defendants stipulated to these facts, they object to their introduction on the ground that they are irrelevant, incompetent and immaterial."

Objection overruled, exception allowed defendants.

"Mr. FLETCHER.—It is further stipulated that the first minutes show Mr. Mentzer was a director and vice-president. These are the minutes of January 10, 1911. That from January 10, 1911 to January 18, 1913, continuously, the minutes of the bank show that T. F. Mentzer was vice-president and director and the minutes do not contain any [57] record of the resignation having been made by him, and that there are no minutes of stockholders or directors' meetings after July 24, 1913."

"Mr. PETERSON.—*Defendant* do not object to the stipulation as to what the minutes show, but do not admit it to be a fact that T. F. Mentzer was an officer or director or vice-president subsequent to January, 1913."

"The COURT.—This is a stipulation as to what the minutes show or do not show. The objection will be overruled, exception allowed defendants."

"Mr. FLETCHER.—It is also stipulated that these minutes show that A. D. Campbell was a di-

(Testimony of R. A. Langley.)

rector and assistant cashier during all the times mentioned."

"Mr. PETERSON.—Defendants do not object to the stipulation as to what the minutes show, but object to the matter as immaterial, irrelevant and incompetent."

Objection overruled, exception allowed defendants.

"Mr. FLETCHER.—We offer the minute-book in evidence with the request that we may copy the minutes and substitute copy for the book."

"Mr. PETERSON.—We do not object to the copy, but we object to the offer as being immaterial, irrelevant and incompetent."

Objection overruled, exception allowed defendants.

The minute-book with privilege to substitute a copy was admitted in evidence as Plaintiff's Exhibit 18.

"Mr. FLETCHER.—It is admitted that at all times mentioned in the proceedings W. Dean Hays and Ora J. Hays were husband and wife; A. D. Campbell and Jessie E. Campbell were husband and wife, and that David Copping and Eva Copping were husband and wife. It is further admitted that since the commencement of this action, David Copping died; that prior to his death he conveyed all the property to his wife, and that the property was community property of himself and wife. [58] That Isaac Blumauer and W. Dean Hays and Ora Hays are in default."

(Testimony of R. A. Langley.)

Cross-examination by Mr. PETERSON.

Witness Langley identifies defendant's identification "C" as being found by him in the letter-file of the bank when he took possession as receiver. Witness also identifies in the same way the defendants' identifications "D" and "E"; that he is acquainted with the defendant T. F. Mentzer, knows his signature and handwriting. That identification "E" is in his handwriting and contains his signature, and is dated March 8th, 1913. Thereupon identification "E" was offered in evidence, it being the resignation of Mr. Mentzer as vice-president of the State Bank of Tenino, dated March 8, 1913.

The offer was objected to by plaintiff as not being cross-examination, and as being a part of defendant's defense. Objection overruled, exception allowed plaintiff, and the identification was admitted as Defendants' Exhibit "E."

Witness proceeds and identifies defendants' identification "F" as being found by him in the letter files of said State Bank of Tenino when he assumed charge as receiver. The identification was offered in evidence, being a letter from defendant Mentzer to defendant Blumauer dated March 8, 1913, regarding Mr. Mentzer's resignation. The offer was objected to on the same grounds as the prior offer. Objection overruled, exception allowed plaintiff. Whereupon the letter was admitted as Defendants' Exhibit "F."

Under direction of the Court, as these two exhibits were difficult to read, they were to be copied

(Testimony of R. A. Langley.)

by the defendants' attorney and copy filed as a part of these exhibits. Thereupon the following proceedings were had:

"Mr. FLETCHER.—Now, Mr. Peterson, I understand the defendants will admit that under plaintiff's liability on this bond of June 22, 1914, and on demand of the Treasurer of Thurston County, plaintiff paid the Treasurer of Thurston County \$4,327.87 on December 30th, 1914." [59]

"Mr. PETERSON.—Yes, that is admitted, but objected to on the ground that it is incompetent, irrelevant and immaterial."

Objection overruled, exception allowed defendants.

"Mr. FLETCHER.—It is further admitted that shortly after the bank's failure, the Treasurer of Thurston County made demand upon *upon* plaintiff to pay its share of the loss by reason of the bond of June 22d, 1914."

"Mr. PETERSON.—Yes, that is admitted, but is objected to on the ground that it is irrelevant and immaterial."

Objection overruled, exception allowed defendants.

"Mr. FLETCHER.—It is further admitted that plaintiff upon receiving that demand at once made upon the defendants to pay the loss by reason of their being on the indemnity agreement of June 22d, 1911."

"Mr. PETERSON.—We will admit that fact but object to it as it is immaterial."

(Testimony of R. A. Langley.)

Objection overruled, exception allowed defendants.

“Mr. FLETCHER.—It is further admitted that on the refusal of defendants’ plaintiff then paid the Treasurer as admitted above.”

“Mr. PETERSON.—We will admit that fact but object to it as to its materiality.”

Objection overruled, exception allowed defendants.

“Mr. FLETCHER.—It is further admitted that on the bank’s failure, the plaintiff expended the sum of \$14 in investigating its liability.”

“Mr. PETERSON.—That is admitted, but objected to as irrelevant and immaterial.”

Objection overruled, exception allowed defendants.

“Mr. FLETCHER.—It is further admitted that the plaintiff is a corporation organized under the laws of the State of New York with its principal place of business in New York City, and that it is a citizen and resident of the State of New York. That it is duly [60] qualified and licensed to prosecute a general surety business in the State of Washington; that it has fully complied with the laws of the State of Washington in that regard; in other words, that the plaintiff is qualified to maintain this action.”

“Mr. PETERSON.—Yes, that is admitted.

“Mr. FLETCHER.—It is further admitted that on the payment that the plaintiff made to the county of \$4,327.87, the plaintiff received a dividend from

the receiver of the bank, and that there should be credited the sum of \$855.82 on the above amount as of date April 21, 1915. That the plaintiff and no one else has ever paid anything upon this claim excepting the receipt of that dividend."

"Mr. PETERSON.—Yes, that is all admitted."

"Mr. FLETCHER.—That is our case."

(Plaintiff rests.)

"Mr. PETERSON.—If the Court please, the defendants at this time jointly and severally move the court for a judgment of nonsuit and dismissal of plaintiff's action and for costs on the ground and for the reason that the plaintiff has failed to establish a cause of action against the defendants or either of them, and for the further reason and upon the further ground that the proofs offered by plaintiff show affirmatively that it is not entitled to recover against the defendants or either of them."

The foregoing motion was argued by counsel for the respective parties, and at the close of argument the court sustained the motion and in doing so stated as follows:

"The COURT.—This seems to be a question of law under the evidence which has been introduced. I agree with Mr. Fletcher to this extent: These men signing this indemnity agreement, being interested in the bank, that is one of the circumstances to be taken into account in interpreting the contract. The recital that they signed this indemnity agreement in consideration of one dollars, that [61] may be enough to effect a consideration, but I do not deem

it of any importance in weighing the intent of the parties in entering into the agreement, or in changing the rule of *strictissimi juris*. The fact that they were interested in the bank—no doubt, their main purpose and interest in the matter was to further the business of the bank. I believe, in ruling on the demurrer, the matter that was in my mind when I sustained the demurrer to one of the affirmative defenses was regarding this right of action. It seems to me there is a difference in determining who has a right of action on this bond and determining what the bond means. It is true the treasurer, Marr, was the obligee in the bond; but not only that, but there was a provision in the bond that the company was only bound on account of money deposited in the bank by him or for him. Now, that is what was secured, and if the bonding company, for its benefit, put that provision in there, limiting its liability, and if such a provision was not contemplated, as subject to change, I do not see that it has any complaint to make if it was put in there for its advantage and it also resulted to the advantage of the indemnitors. While the fact that these indemnitors were furthering the advantage and interests of the bank, which I find to have been their main interest, yet there is no authority on the part of the Court to disregard these provisions in the main bond which are adopted and made a part of the indemnity agreement, by which the bonding company was only bound on account of money deposited by Marr, or to his credit under it, I find that the provisions of this indemnity agreement, having been on a printed form used by the

bonding company, are to be construed most strongly against the bonding company, and that these provisions in section five, regarding changes and alterations and the like, are changes and alterations of the instrument. It does not say the contract or agreement may be changed or anything of that kind. It says "the instrument" may be altered, changed, modified, limited or extended. [62] I find that to mean that such interlineations or changes in details may be made on the face of the instrument, not contrary to its purpose as would make it more full and complete but not different or contrary to its main purpose or effect. I do not believe that that section five would give anybody authority to tear up the contract in effect and make an entirely new one, increase the amount, change the parties or guarantee something entirely different. One thing that leads me to this conclusion is that, although that language about changing, altering or modifying is used, after they had used that language, which might be given a very broad meaning, they then go on and use the language about removing and extending, while, if the company could change, alter and modify in a broad sense, when by the contract provision it was to run for a year, it would not be necessary to say anything about renewing or extending it, in order to change or alter it to make it run for two years. If not so limited, it is not clear but that the indemnitors might be bound so long as the bank continued in business and the county had money to deposit. Such a result would require language more clear and unambiguous. For that reason, I believe that the words about

changing and modifying must be given some narrower meaning than they might otherwise have. I agree with Mr. Peterson's last argument regarding section eight, that is that by the bonds made "at the instance of us or any of us" is meant the changed instruments or new bonds in lieu of or in place of the bond referred to in the fifth paragraph in the indemnity agreement. I have very grave doubt, under the language of this agreement, whether there was any authority to make but one renewal. When authority was given to renew this bond, once renewed, under the ordinary rule of powers of attorney, the power would be exhausted when one renewal was granted; but, passing that by and granting that the second renewal was good, the bond was not given in place of or in lieu of this original bond because the original bond had expired and the new bond [63] went on beyond it, after this last renewal had expired. It was not a renewal because it was different in its terms from the original. The motion will be granted. Exception allowed. The only case cited which gave me any question about the matter was this one in 1st Wheaton, but there the language used by the Court is that the agent "was to perform such other duties as from time to time should be assigned to the office of agent by the board of directors." It is not like the bond in this case, where Marr was named as treasurer, but it simply designated the board of directors generally, and thereby his duties were made continuous, while here the language of the bond is: "Moneys deposited by or for Robert Marr, Treasurer."

“The motion will be granted and exception allowed the plaintiff. The defendant may prepare a judgment according to this ruling, and the plaintiff may have thirty days from date of entering the judgment to prepare and serve and file a bill of exceptions and statement of facts in this cause.”

The jury was then recalled and discharged by the Court from further considering this cause.

The plaintiff objected to the granting of the motion and to the discharge of the jury. Objection overruled, exception allowed the plaintiff.

**Certificate of United States District Judge Re
Certification of Bill of Exceptions and State-
ment of Facts.**

United States of America,
Western District of Washington,
Southern Division.

I, E. E. Cushman, the undersigned Judge of the District Court of the United States, Ninth Judicial Circuit, Western District of Washington, Southern Division, before whom the above-entitled cause was tried, do hereby certify that the matters and proceedings set forth [64] in the foregoing bill of exceptions and statement of facts are all of the matters and proceedings which occurred on the trial of said cause, and the same are hereby made a part of the record therein.

I further certify that said bill of exceptions and statement of facts contains all the material facts and evidence introduced on the trial of said cause by and on behalf of the respective parties thereto, together

with a statement of all motions, objections and rulings thereon, and exceptions taken thereto by the respective parties occurring in the trial of said cause, and the same are hereby made a part of the record in said cause, and that the exhibits introduced by the respective parties upon said trial will be filed herewith and the clerk of this court is directed so to do.

Counsel for the respective parties hereto being present and concurring herein.

IN WITNESS WHEREOF I have hereunto set my hand this 5th day of March, A. D. 1917, at Tacoma, in said District.

EDWARD E. CUSHMAN,

Judge.

(Filed Feb. 6, 1917.)

(Re-filed as certified March 5, 1917.) [65]

[Billhead of Geo. W. Allen & Co.]

Seattle, Wash., June 12th, 1913.

State Bank of Tenino,

W. Dean Hays, Cashier, Tenino, Wash.

Date.

Covers.

6/22/13 National Depository bond to Treasurer, Thurston County, Washington

Number.

596917

Amount.

\$5,000

Term.

1 yr.

Premium.

\$25.00

Paid 6/12/13.

GEO. W. ALLEN & CO.

Per G. W. A.

Letter, June 13, 1913, Hays to Britt.

[Letter-head of State Bank of Tenino.]

Tenino, Wash, June 13, 1913.

Mr. W. H. Britt,
County Treasurer,
Olympia, Wash.,

Dear Sir:—

Enclosed please find herewith receipt for premium on bond No. 596917, National Surety Co., for \$5,000 which expires on June 22, which continues the same in force one year.

Thanking you to acknowledge receipt of same, I am,

Very truly yours,

W. DEAN HAYS,

Cashier.

[Billhead of Geo. W. Allen & Co.]

Seattle, Wash., June 5, 192—

State Bank of Tenino,
Tenino, Wash.

Date.	Company.	Covers.	Number.	Amount.	Term.	Premium.
6/22/12	National	Depository Bond to Rob't.	596917	\$5,000.00	One year	\$25.00

Marr, Treasurer, Thurston
County.

Paid 6/10/12.

GEO. W. ALLEN & CO.
Per A.

Letter, June 7, 1912, State Bank of Tenino to Marr.

[Letter-head of State Bank of Tenino.]

Tenino, Wash., June 7, 1912.

Hon. Robert Marr, Treasurer,
Olympia, Wash.

Dear Sir:

Inclosed herewith is a letter from the National Surety Company in re \$5,000.00 depositary bond which indicates that the same is continuous upon the payment of the premium, which we have this day remitted, but if there is any further evidence on the payment, we will be glad to furnish it.

With kind personal regards, I am,

Very truly yours,

STATE BANK OF TENINO,

W. DEAN HAYS,

V. President.

WDH/TK.

Inc.

Ansd. 6/8/12. R. M.

Filed in Superior Court, Thurston Co., Wash.
Jun. 13, 1912. D. G. Parker, Clerk.

[Billhead of Geo. W. Allen & Co.]

State Bank of Tenino,
Tenino, Wash.

Date.	Company.	Covers.	Number.	Amount.	Term.	Premium.
6/22/12	Natl. Your	Depository Bond to	596917	5000	1 yr.	\$25.00

Treas. Thurston Co., Wn.

Paid 1/23/13.

GEO. W. ALLEN & CO.

WELCH.

Duplicate.

Seattle, Wash., 1-23-13.

Letter, January 24, 1913, Welch to Hays.

[Letter-head of National Surety Company]

Jan. 24, 1913.

W. Dean Hays, Cashier,
State Bank of Tenino,
Tenino, Washington.

Dear Sir:

Acknowledging your esteemed favor of the 20th inst., herewith duplicate receipt which renews your Depository Bond in favor of Treasurer of Thurston County, Washington, from June 22d 1912 until June 22d 1913.

Trusting this is satisfactory, and with kindest regards, I remain,

Yours very truly,

EDW. P. WELCH,

Secretary.

EPW/M.

Enc.

Plaintiff's Exhibit 1—Depository Bond, June 22, 1911, Between State Bank of Tenino et al. and Robert Marr.

KNOW ALL MEN BY THESE PRESENTS, That we, THE STATE BANK OF TENINO, of Tenino, Washington, as principal, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto Robert Marr, individually and as County Treasurer of the County of Thurston, State of Washington, in the full and just sum of five thousand (\$5,000.00)

dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and surety respectively bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

SIGNED, SEALED AND DELIVERED, at Seattle, Washington, this 22nd day of June A. D. 1911.

THE CONDITION OF THIS OBLIGATION IS SUCH, that, whereas the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such Treasurer, at the special instance and request of the said State Bank of Tenino, has deposited, or may hereafter, from time to time, deposit with, and place in charge of the said principal hereinbefore named, certain moneys, checks, etc., for the custody or for the proceeds of the face value of which the said Treasurer as such, may be responsible, and,

NOW, THEREFORE, if the said principal hereinbefore named shall in due and ordinary course of business, promptly pay to the said Treasurer upon demand and presentation of proper and valid checks therefor, in the usual and ordinary hours of business, all moneys and proceeds of all checks, etc., which have been or shall hereafter be deposited with, transferred to or placed in charge of the said principal, by or on behalf of the said Treasurer, and shall keep and hold harmless the above-named Robert Marr, individually, and as such Treasurer, from all liability, loss and damage which may arise, or accrue against the said Treasurer by reason of the deposit

or delivery of said funds, checks, etc., or any part thereof as aforesaid, and shall well and truly fulfill and perform any and every duty and obligation arising out of or connected with the deposits, or delivery of funds as aforesaid, by and on behalf of said Treasurer, then this obligation to be void; otherwise to be and remain in full force and effect.

PROVIDED, HOWEVER, upon the further following express conditions:

FIRST. That in the event of any default on the part of the principal written notice thereof with a verified statement of the facts showing such default, and the date thereof, shall within ten (10) days after the knowledge of such default, has been received by the said Robert Marr, or his representatives be mailed to the surety at its office in New York City.

SECOND. That the surety shall not be liable for any deposits made after any such default shall have come to the knowledge of the said Robert Marr or his representatives.

THIRD. That the said surety shall not be liable hereunder except for the loss of moneys belonging to the said Robert Marr, Treasurer, and which shall have been deposited with the aforesaid principal by the said Robert Marr, as Treasurer aforesaid, or to his credit as such Treasurer.

FOURTH. That no such suit, action or proceeding shall be brought or instituted against the surety upon or by reason of, any default, of the principal after the expiration of sixty days after such default, or, in any event, after the 22nd day of June, 1912.

FIFTH. That the surety shall have the right to

terminate its suretyship under this obligation by serving notice of its election so to do upon said "obligee" or his, or its lawful representatives, and thereupon the said surety shall be discharged from any and all liability hereunder for any default of the principal occurring after the expiration of thirty days after the service of such notice.

SIXTH. That, if the obligee shall at any time hold concurrently with this bond, or represent to the surety, in any statement to it, that it does or will at any time hold concurrently with this bond, or any other bond or collateral as guarantee of security from or on behalf of the principal, the obligee shall be entitled, in event of loss as hereinbefore stated, to claim hereunder only such proportion of the loss as the penalty of this bond bears to the sum of the penalties of all bonds and amount of collateral carried, or to be carried on the principal's behalf, and in no event shall the surety be liable for any sum in excess of the penalty of this bond.

STATE BANK OF TENINO,

By ISAAC BLUMAUER,

[Seal of State Bank of Tenino] President.

Attest: W. DEAN HAYS,

Cashier.

NATIONAL SURETY COMPANY,

By ROBT. A. HULBERT,

Resident Vice-President.

GEO. W. ALLEN,

Resident Assistant Secretary.

[Seal of National Surety Company]

Approved June 30, 1911.

JOHN M. WILSON,
County Attorney.

ROBT. MARR,
County Treasurer.

A. M. ROWE,
Chair. Board County Comm.

NATIONAL SURETY COMPANY.

Certificate of Appointment of Resident
Vice-President.

KNOW ALL MEN BY THESE PRESENTS,
That Robt. A. Hulbert has been and is hereby appointed Resident Vice-President of the National Surety Company, at Seattle, Washington, and as such Resident Vice-President has full power and authority to sign and execute on behalf of the Company any and all bonds, and all bonds signed by him, when sealed and attested by the Secretary, an Assistant Secretary, or a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds had been signed by the President and duly sealed and attested.

Said appointment is made under and by authority of a certain By-Law adopted by the Board of Directors of said National Surety Company at a regular meeting duly called and held on the sixth day of February, 1900, a certified copy of which is hereto attached, and is subject to revocation as therein provided.

IN TESTIMONY WHEREOF, the National Surety Company has caused these presented to be signed by its Second Vice-President, and its cor-

porate seal to be hereto affixed, duly attested by its Assistant Secretary, this 23d day of February, A. D. 1907.

[Seal]

BALLARD McCALL,
2d Vice-President.

Attest: GILBERT CONGDON,
Assistant Secretary.

State of New York,
County and City of New York,—ss.

On this 23d day of February, A. D. 1907, before me appears Ballard McCall, 2d Vice-president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn says that he is 2d Vice-president of the National Surety Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company; and that he signed said instrument as 2d Vice-president of said company by like authority; The said Ballard McCall further says that he is acquainted with Gilbert Congdon, and knows him to be Asst. Secretary of said company; that the signature of said Gilbert Congdon subscribed to the said instrument, is the genuine handwriting of the said Gilbert Congdon and was thereto subscribed by like order of the said Board of Directors.

[Seal]

R. W. MYERS,
Notary Public.

COPY OF BY-LAW.

BE IT REMEMBERED, that at a meeting of the Board of Directors of the National Surety Company,

duly called and held on the Sixth day of February, 1900, a quorum being present, the following By-law was adopted:

“Article XII, Section 1: The President, Vice President, or Second Vice President may from time to time appoint Resident Vice-Presidents, Resident Assistant-Secretaries and Attorneys in Fact, to represent and act for and on behalf of the Company; and either the President, Vice President, Second Vice-President, the Board of Directors, or the Executive Committee may, at any time, remove any such Resident Vice-President, Resident Assistant Secretary or Attorney in Fact, and revoke the power and authority given him.

Sec. 2: Resident Vice-Presidents. Resident Vice-Presidents shall have power and authority to sign and execute on behalf of the company any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and to bind the company thereby as fully and to the same extent as the President could bind it.”

State of New York,

City and County of New York,—ss.

I, Gilbert Congdon, Asst. Secretary of the National Surety Company, do hereby certify that the above and foregoing is a full, true and correct copy of a By-law adopted by the Board of Directors of said Company, at a meeting held on the sixth day of February, 1900, as the same appears upon the records of the company now in my possession and custody as Asst. Secretary.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said company at the city of New York this 23d day of February, A. D. 1907.

[Seal]

GILBERT CONGDON,
Assistant Secretary.

State of New York,
City and County of New York,—ss.

I, Wm. I. Hawks, Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of an instrument executed by said National Surety Company on the 23d day of February A. D. 1907, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said company at the City of New York this 6th day of April A. D. 1911.

W. I. HAWKS,
Assistant Secretary.

[Seal of National Surety Co.]

NATIONAL SURETY COMPANY.

Certificate of Appointment of Resident Assistant Secretary.

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KNOW ALL MEN BY THESE PRESENTS, That George W. Allen has been and is hereby appointed Resident Assistant Secretary of the National Surety Company at Seattle, Washington, and as such Resident Assistant Secretary has power and authority to seal and attest on behalf of the company any and all, bonds, and all bonds sealed and attested by him, when signed by the President, Vice President,

Second Vice President, or a Resident Vice-President, shall be as valid and binding upon the company as if said bonds had been sealed and attested by the Secretary.

Said appointment is made under and by authority of a certain By-law adopted by the Board of Directors of said National Surety Company at a regular meeting duly called and held on the Sixth day of February, 1900, a certified copy of which is hereto attached, and is subject to revocation as therein provided.

IN TESTIMONY WHEREOF, The National Surety Company has caused these presents to be signed by its Second Vice-president, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this eleventh day of October A. D. 1906.

BALLARD McCALL,
President.

Attest: GILBERT CONGDON,
Assistant Secretary.

[Corporate Seal]

State of New York,
City and County of New York,—ss.

On this eleventh day of October, A. D. 1906, before me appears Ballard McCall, Second Vice-president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, says, that he is 2d Vice-president of the National Surety Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed

by order of the Board of Directors of said company, and that he signed said instrument as Second Vice-president of said company, by like authority. The said Ballard McCall further says that he is acquainted with Gilbert Congdon and knows him to be the Assistant Secretary of said company; that the signature of said Gilbert Congdon subscribed to the said instrument, is in the genuine handwriting of the said Gilbert Congdon and was thereto subscribed by like order of the said Board of Directors.

[Notarial Seal] MARGARETTA CROOKE,
Notary Public.

Filed July 8, 1911. D. G. Parker, Clerk.

[Endorsed]: Depository Bond. Executed June 22d, 1911. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 1. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 1. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 2—Indemnity Agreement,
June 22, 1911, Between Isaac Blumauer et al.
and National Surety Co.**

INDEMNITY CONTRACT FOR BOND No.
596,917.

NATIONAL SURETY COMPANY.

THIS AGREEMENT WITNESSETH, That,
Whereas, we the undersigned have requested the

National Surety Company, a corporation under the laws of the State of New York (hereinafter called the Company), to sign and execute a certain bond or undertaking in the penalty of Five Thousand Dollars (\$5,000.00) in behalf of the State Bank of Tenino in favor of the Treasurer of Thurston County, Washington, effective June 22, 1911, covering deposits of the said Treasurer in said Bank reference to which bond or undertaking is hereby made for the purpose of certainty and a copy of which instrument is or may be hereto attached, and

WHEREAS, The Company has signed and executed, or is about to sign and execute, the said instrument upon condition of the execution and delivery thereof and upon the security and indemnity hereby and herein provided,

NOW, THEREFORE, In consideration of the premises and of the sum of One Dollar in hand paid to us by the Company, the receipt whereof is hereby acknowledged, we, the undersigned, hereby covenant and agree with the Company, its successors and assigns, in manner following:

First: That we will pay in cash to the Company at its principal offices in the City of New York, or to such agent or representative of the company as the company may in writing designate, the sum of twenty-five and no/100 (\$25.00) dollars, which is agreed by the undersigned to be the company's compensation for the accommodation afforded the undersigned by the execution of said instrument by the company, said sum to be paid to the company annu-

ally in advance on the twenty-second day of June in each and every year during the time the company shall be and continue liable upon the said instrument, and until the company shall have been fully discharged and released from any and all liability upon the said instrument, and all matters arising therefrom, and until there shall have been furnished to the Company, at its principal offices in the City of New York, due and satisfactory proof by evidence legally competent, of such discharge and release.

Second: That we will at all times indemnify and keep indemnified the company, and hold and save it harmless from and against any and all, demands, liabilities, loss, damage, or expense of whatsoever kind of nature, including counsel and attorney's fees, which it shall at any time sustain or incur by reason, or in consequence of having executed said instrument; and that whenever any claim or claims shall have been made upon the Company under the said instrument, if in the judgment of the Company it is determined that such claim or claims should be paid, we covenant, promise and agree to pay over in cash to the company upon its demand therefor, the amount or amounts of said claim or claims; and if the company deny liability concerning any claim or claims and suit or suits be brought against the company under said instrument to recover the amount of said claim or claims, or any other proceeding or proceedings be taken thereon involving the company, whether the suits and proceedings be against the Principal named in the said instrument, and the company jointly, or against the company

alone, we covenant and agree to defend said suits and proceedings to a conclusion at our own expense, or to permit the company, if it so elect, to place the defense of such suits and proceedings in the hands of its own attorneys or counsel, in which latter event we covenant, promise and agree to pay over to the company upon its demand such sum or sums of money as may be required to retain said attorneys or counsel and to defray the expenses of conducting the defense of said suits and proceedings; and further, we covenant and agree to satisfy and discharge any and all judgments recovered against the Company under said instrument as soon as the same shall be entered or docketed unless an appeal be taken and bond or bonds to secure or stay the collection of such judgment or judgments be procured by the undersigned and filed as required by law, and if final judgment be recovered or entered against the Company after the decision of such appeal, we covenant and agree to forthwith satisfy and discharge every such final judgment without requiring the Company to take any steps whatsoever thereon; and should judgment be entered against the principal in said bond and the Company, or against the Company alone, in either event, should the undersigned not procure an appeal to be taken, and furnish bond or bonds to secure, supersede or stay the collection of such judgment, the Company may, if it elect, pay said judgment, whereupon we agree to forthwith repay to the Company, the amount of said judgment so paid together with legal interest thereon from the date of payment to the date of such repayment; that we will

pay over, reimburse and make good to the company, its successors and assigns, all sums and amounts of money not hereinbefore provided for, which the company or its representatives shall pay, or cause to be paid, or become liable to pay under its obligation upon said instrument, or as charges and expenses of whatsoever kind or nature, including counsel and attorneys' fees by reason of the execution thereof, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the Company as soon as it shall have become liable therefor, whether it shall have paid out said sum or any part thereof, or not.

That in any settlement between us and the Company, the vouchers or other proper evidence showing payment by the company of any such liability, loss, damage, or expense, shall be *prima facie* evidence against us of the fact and amount of our liability to the Company, provided that such payment shall have been made by the Company in good faith, believing that it was liable therefor.

Third: That in case any action at law, suit in equity, or other proceeding be commenced or notice of such action, suit or proceeding be served upon the undersigned, affecting the liability of the Company upon said instrument or growing out of any matter connected herewith, or on account of which the said instrument was given, we will immediately so notify the company at its principal office in the City of New York.

Fourth: The Company may, at any time hereafter take such steps as it may deem necessary or proper

to obtain its release from any and all liability under the said instrument, or under any other instrument within the meaning of Section Fifth hereof, and to secure and further indemnify itself against loss, and all damages and expense which the Company may sustain or incur or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by us.

Fifth: That no act or omission of the Company in modifying, amending, limiting or extending the instrument so executed by the Company shall in any wise affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof, or other and new obligation in its place or in lieu thereof, and without notice to us, notice being expressly waived, and in any such case we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended, limited or extended instrument, or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein.

Sixth: It shall not be necessary for the Company to give us, or either of us, notice of any act, fact or information coming to the notice or knowledge of the Company concerning or affecting its rights or liability under any such instruments by it so executed, or our rights or liabilities hereunder, notice

of all such being hereby expressly waived.

Seventh: That this agreement shall bind not only the undersigned jointly and severally, but also our respective heirs, executors, administrators, successors and assigns (as the case may be), until the Company shall have executed a release under its corporate seal, attested by the signatures of its officers proper for the purpose.

Eighth: That these covenants as also all collateral securities or indemnity, if any, at any time deposited with or available to the Company concerning any bond or undertaking executed for or at the instance of us, or any of us, shall, at the option of the Company, be available in its behalf and for its benefit and relief as well concerning any or all former or subsequent bonds or undertakings executed for us, or at the instance of us, or any of us, as concerning the bond or undertaking such covenants, collateral securities or indemnity shall have been made, deposited or given.

Ninth: It is distinctly covenanted and agreed that it is the true *intent meaning* of the provisions of this instrument among other things, that immediately upon any default on the part of the principal of said bond in performing any of the obligations thereof, or immediately upon any claim being made upon the Company the undersigned shall pay over to and deposit with the Company in cash, the full amount of moneys, or the equivalent thereof, with accrued interest, if any, alleged by the holder of said bond to be in the hands of said principal or on deposit with

it belonging to such holder, up to but not exceeding the penalty of said bond.

IN TESTIMONY WHEREOF, We have hereunto set our hands and affixed our seals this 22d day of June, 1911.

ISAAC BLUMAUER, (Seal)

P. O. Address: Tenino, Wash.

T. F. MENTZER, (Seal)

P. O. Address: Tenino, Wash.

W. DEAN HAYS, (Seal)

P. O. Address: Tenino, Wash.

A. D. CAMPBELL,

DAVID COPPING,

Tenino, Wash.

STATE BANK OF TENINO,

ISAAC BLUMAUER,

President.

[Seal of Bank]

W. DEAN HAYS,

Cashier.

State of Washington,

County of King,—ss.

On this 22d day of June, 1911, before me personally came Isaac Blumauer, T. F. Mentzer, W. Dean Hays, A. D. Campbell and David Copping, to me known and known to me to be the individuals described in and who executed the foregoing agreement, and each acknowledged that he executed the same.

[Notarial Seal of Geo. W. Allen]

GEO. W. ALLEN,

Notary Public in and for the State of Washington,

Residing at Seattle.

State of Washington,
County of Thurston,—ss.

On the 24th day of June, in the year 1911, before me personally came Isaac Blumauer, to me known who being by me duly sworn, did depose and say: That he resides in Tenino, Wash., that he is the President of the State Bank of Tenino, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

[Notarial Seal of J. F. Cannon]

J. F. CANNON,

Notary Public in and for the State of Washington,
Residing at Tenino.

[Endorsed]: Indemnity Agreement. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 2. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 2. Filed Apr. 5, 1917. F. D. Monekton, Clerk.

Plaintiff's Exhibit 3—Letter, May 23, 1914, Allen to Hays.

[Letter-head of National Surety Company.]

May 23, 1914.

Mr. W. Dean Hays, Vice Prest.,
State Bank of Tenino,
Tenino, Washington.

My dear Dean:—

In reply to your esteemed favor of the 22d instant, herewith receipt covering premium. If Mr. Marr's term of office expired, and Mr. Britt was elected to succeed him, we should send you entirely new bond. If Mr. Britt otherwise succeeded Mr. Marr, it would not be necessary.

Please advise by return mail, so that we may know, and if necessary send you new bond.

With kindest personal regards, I remain

Very truly yours,

GEO. W. ALLEN,

Manager.

GWA/RW.

[Endorsed]: No. 1783. United States District Court, Western District of Washington. National Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 3. Deft. Ex. "B." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 3. Filed Apr. 5, 1917. F. D. Monekton, Clerk.

**Plaintiff's Exhibit 4—Letter, May 22, 1914, Hays to
Allen & Co.**

[Letter-head of State Bank of Tenino.]

Tenino, Wash., May 22, 1914.

Geo. W. Allen & Co.,

Alaska Bldg.,

Seattle, Wash.

My dear George:

Enclosed herewith is a draft for \$25.00 in payment for renewal of depository bond.

In this connection I desire to state that our county treasurer is Mr. W. H. Britt who succeeded Robert Marr, and if necessary please make an endorsement to that effect.

Thanking you for your attention in this matter,
I am

Very truly yours,

STATE BANK OF TENINO,

W. DEAN HAYS,

V. President.

H/L—Enc. 2.

[Endorsed]: Plts. Ident. IV, 11/15/ 16. No. 1783.
United States District Court, Western District of
Washington. Nat. Surety Co. vs. Blumauer et al.
Plaintiff's Exhibit No. 4. Filed in the U. S. District
Court, Western Dist. of Washington, Southern Di-
vision. Nov. 15, 1916. Frank L. Crosby, Clerk.
By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the
Ninth Circuit. Plaintiff's Exhibit 4. Filed Apr. 5,
1917. F. D. Monekton, Clerk.

**Plaintiff's Exhibit 5—Letter, May 25, 1914, Hays to
Allen & Co.**

[Letter-head of State Bank of Tenino.]

Tenino, Wash., May 25, 1914.

Geo. W. Allen & Co.,

Alaska Bldg.,

Seattle, Wash.

My dear George:

Your favor of the 23rd inst. enclosing receipt for annual premium has been received and in connection therewith beg to state that Mr. W. H. Britt was elected to succeed Mr. Robert Marr at the election two years ago, hence I imagine that it is necessary for you to issue a new bond, which I trust you will do and forward to us, however, the same bond has been renewed once or twice since Mr. Britt assumed office.

Thanking you for your attention in this matter,
I am

Very truly yours,

STATE BANK OF TENINO,

W. DEAN HAYS,

V. President.

H/L.

[Endorsed]: Plts. Ident. V, 11/15/16. No. 1783.
United States District Court, Western District of
Washington. Nat. Surety Co. vs. Blumauer et al.
Plaintiff's Exhibit No. 5. Filed in the U. S. District
Court, Western Dist. of Washington, Southern Di-
vision. Nov. 15, 1916. Frank L. Crosby, Clerk.
By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 5. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit 6—Letter, May 26, 1914, Allen to Hays.

[Letter-head of National Surety Company.]

May 26, 1914.

Mr. W. Dean Hays, Vice President,
State Bank of Tenino,
Tenino, Wash.

My dear Dean:—

Acknowledging your esteemed favor of the 25th instant, we enclose herewith new bond duly executed in favor of W. H. Britt, County Treasurer of Thurston County, Washington, effective June 22d, 1914. We think it is best that a new bond be filed as of the anniversary date of the former bond, and we will, therefore, require new application signed by your good institution, which kindly let us have, together with copy of your latest financial statement, by return mail. It will also be necessary that the enclosed release be signed by the Treasurer covering the former bond, as the same by its terms is continuous, and we must have this release to enable our home office to relieve our account of future premiums.

Thanking you to let us have the application and release promptly, and with kindest regards, I remain,

Very truly yours,

GEO. W. ALLEN,

Manager.

GWA. RW.

[Endorsed]: Plt. Ident. VI. 11/15/16. Deft. Ex. "D." No. 1783. United States District Court, Western District of Washington. National Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 6. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals, for the Ninth Circuit. Plaintiff's Exhibit 6. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit 7—Letter, June 25, 1914, Allen to Hays.

[Letter-head of National Surety Company.]

June 25th, 1914.

Mr. W. Dean Hays, Vice President,
State Bank of Tenino,
Tenino, Washington.

Dear Dean:—

Referring to our letter of May 2nd, kindly let us have application covering bond which accompanied ours of that date, and also copy of latest financial statement of your good institution.

The application we forwarded you, no doubt, has been misplaced, and we therefore enclose new application, and will ask that you kindly let us have the same by return mail, obliging.

Thanking you, and with personal regards, I remain,

Very truly yours,

GEO. W. ALLEN,

Manager.

GWA/RW.

[Endorsed]: Plts. Ident. VII. 11/15/16. Deft. Ex. "E." No. 1783. United States District Court, Western District of Washington. National Surety Co., vs. Blumauer et al. Plaintiff's Exhibit No. 7. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals, for the Ninth Circuit. Plaintiff's Exhibit 7. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

**Plaintiff's Exhibit 8—Letter, May 26, 1914, Britt to
State Bank of Tenino.**

[Letter-head of Thurston County Treasurer.]

Olympia, Wash., May 26/14.

State Bank,

Tenino, Wash.

Gentlemen:

I just received renewal certificate from National Insurance Co., which runs to Robt. Marr, which should not be so, I am of the opinion, that, as the bond is made to Robt. Marr as County Treasurer, it would be much better to have a New Bond made in my name as County Treasurer.

Please take this matter up at once and have the change made as soon as possible.

I return the certificate just received herewith.

Yours truly,

W. H. BRITT.

[Endorsed]: Plts. Ident. 8. 11/15/16. Deft. Ex. "G." No. 1783. United States District Court,

Western District of Washington. National Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 8. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 8. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit 9—Letter, May 29, 1914, Hays to Britt.

May 29, 1914.

Mr. W. H. Britt, Treas.,

Olympia, Wash.

My dear Mr. Britt:

You will herewith please find Depository Bond of the National Surety Company of New York in your favor for \$5000.00 maturing June 22, 1915, to take the place of the one heretofore issued to Robert Marr as treasurer.

You will *also two blank* releases for the former bond which you will kindly sign and return to us.

Thanking you for your attention to this matter and trusting that you will find everything satisfactory, I am,

Very truly yours,
STATE BANK OF TENINO,
W. DEAN HAYS,

H/L—Enc. 3.

V. President.

[Endorsed]: Plts. Ident. 9. 11/15/16. H. No. 1783. United States District Court, Western Dis-

trict of Washington. National Surety Co. vs. Blu-mauer et al. Plaintiff's Exhibit No. 9. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 9. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit 10—Depository Bond, June 22, 1914, Between State Bank of Tenino et al. and W. H. Britt.

DEPOSITORY BOND.

KNOW ALL MEN BY THESE PRESENTS: That the State Bank of Tenino as Principal, and National Surety Company, a corporation organized and existing under and by virtue of the Laws of the State of New York, and authorized to do business in the State of Washington, as surety, are firmly held and bound unto W. H. Britt, Treasurer of the County of Thurston, State of Washington in the sum of Five Thousand Dollars (\$5,000.00) for the payment of which, well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Dated this 22nd day of June, A. D. 1914.

WHEREAS, the said Principal, the State Bank of Tenino, has been designated by W. H. Britt, Treasurer of Thurston County, as a depository of the current funds in the hands or possession of said Treasurer W. H. Britt to be deposited in the said Bank; the amount whereof shall be subject to withdrawal

or diminution by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine, and

WHEREAS, the said Bank, in consideration of such deposit and of the privilege of keeping same, has agreed to pay the County of Thurston State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month, or any fraction thereof next preceding the crediting of said interest, which interest shall be computed and credited to the account of W. H. Britt, Treasurer of said County of Thurston, State of Washington, and shall become thenceforth a part of such deposit.

NOW THEREFORE, if the said The State Bank of Tenino, shall at the beginning of every month render to the Treasurer of Thurston County, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of W. H. Britt, Treasurer as aforesaid, and shall pay over the same, or any part thereof, upon the check or written demand of said Treasurer and to his successor in office, and shall calculate, credit and pay such interest, as aforesaid, and shall in all respects save and keep the said County, and the County Treasurer of the said County harmless and indemnified for and by reason

of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90 entitled "An Act regulating the keeping and deposit of public funds in banks by the several treasurers of the State of Washington," passed by the Legislature of the State of Washington at its tenth regular session, in the year 1907, then this obligation shall be void and of no effect; otherwise to be and remain in full force and effect.

PROVIDED:

1. That the National Surety Company, surety on said bond, shall have the right to terminate its liability under this obligation by serving notice of its election so to do upon the said Treasurer and the said National Surety Company shall be discharged from any and all liability hereunder for any default of the said The State Bank of Tenino, principal, occurring after the expiration of thirty (30) days after the service of such notice.

2. The surety shall only be liable for such proportion of the total loss or damage sustained by said Obligee by reason of any default of the Principal embraced within the terms of this bond as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits referred to, but in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond.

IN WITNESS WHEREOF we have hereunto affixed our corporate seal and caused this bond to be duly signed by our respective officers, the date and

year first hereinbefore written.

THE STATE BANK OF TENINO,

By ISAAC BLUMAUER,

President.

Attest: W. DEAN HAYS,

Cashier.

[Seal of Bank]

NATIONAL SURETY COMPANY,

By GEO. W. ALLEN,

Resident Vice-President.

Attest: E. P. WELCH,

Resident Asst. Secretary.

O. K.—THOMAS O'LEARY,

Pros. Atty.

Approved.

A. M. ROWE,

Chairman of Board.

Filed in Superior Court, Thurston County, Wash.,
Jun. 13, 1914. D. G. Parker, Clerk.

[Endorsed]: Depository Bond. Executed June 22d, 1914. No. 1783. United States District Court Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 10. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 10. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit 11—Release, Treasurer, Thurston County, Washington, to National Surety Co. of New York.

National Surety Company,
New York.

Gentlemen:—

As surety on that certain depository bond, dated June 22d, 1911, in behalf of The State Bank of Tenino, in favor of Robert Marr, Treasurer, Thurston County, Washington, in the penalty of \$5,000, you are released from further liability thereunder, from and after the 22d day of June, 1914.

W. H. BRITT,
Treasurer, Thurston County, Wn.

WITNESS:

[Endorsed]: Plts. Iden. 11, 11/15/16. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 11. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 11. Filed Apr. 5, 1917. F. D. Monekton, Clerk.

**Plaintiff's Exhibit No. 12—Commissioner's Minutes,
January 3, 1911.**

COMMISSIONER'S MINUTES.

Tuesday, January 3, 1911.

The County Treasurer, in compliance with Chap-

ter 51, Laws of 1907, filed designations of depositories for County Funds for 1911 as follows:

Capital National Bank, \$37,500

State Bank of Tenino, \$15,000

Said amounts to be the maximum amounts to be deposited in said banks. The action of the Treasurer was approved and the communication ordered placed on file.

CHAMPION B. MANN,
Chairman.

R. A. CRUIKSHANK,
Clerk.

[Endorsed]: Plts. Ident. 12. 11/15/16. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 12. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberg, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 12. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 13—Commissioner's Minutes,
January 8, 1912.**

COMMISSIONER'S MINUTES.

Monday, January 8th, 1912.

The County Treasurer, in compliance with Chapter 51, Laws of 1907, filed designations of depositories for County Funds for 1912 as follows:

Capital National Bank, \$37,500

Olympia National Bank, \$27,000

State Bank of Tenino, \$15,000

The action of the Treasurer was approved by the Board and the communication placed on file.

A. M. ROWE,
Chairman.

R. A. CRUIKSHANK,
Clerk.

[Endorsed]: Plts. Ident. 13. 11/15/16. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 13. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 13. Filed Apr. 5, 1917. F. D. Monekton, Clerk.

**Plaintiff's Exhibit No. 14—Commissioner's Minutes,
January 11, 1913.**

COMMISSIONER'S MINUTES.

Saturday, January 11, 1913.

W. H. Britt, County Treasurer-elect, filed his designations of depositories of County Funds as follows:

Capital National Bank, \$37,500

Olympia National Bank, \$37,500

State Bank of Tenino, \$15,000

A. M. ROWE,
Chairman.

R. A. CRUIKSHANK,
Clerk.

[Endorsed]: Plts. Ident. 14. 11/15/16. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 14. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 14. Filed Apr. 5, 1917. F. D. Monekton, Clerk.

**Plaintiff's Exhibit No. 15—Commissioner's Minutes,
January 12, 1914.**

COMMISSIONER'S MINUTES.

Monday, January 12, 1914.

In compliance with Chapter 51, R. & B. Code, the Treasurer filed his designations of depositories of County Funds as follows:

Capital National Bank, \$37,500

Olympia National Bank, \$37,500

State Bank of Tenino, \$15,000

On motion, action of Treasurer was approved by the Board.

A. M. ROWE,
Chairman.

R. A. CRUIKSHANK,
Clerk.

[Endorsed]: Plts. Ident. 15. 11/15/16. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Plaintiff's Exhibit No. 15. Filed in the U. S. District Court, Western Dist. of Washington, Southern

120 *National Surety Company vs.*

Division. Nov. 15, 1916. Frank L. Crosby, Clerk.
By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the
Ninth Circuit. Plaintiff's Exhibit 15. Filed Apr. 5,
1917. F. D. Monekton, Clerk.

Plaintiff's Exhibit No. 16—Copy of Account, Robt.

Marr Co. Treas.

ROBT. MARR
CO., TREAS.

COPY OF ACCOUNT.

Date.	Checks in Detail.	Total Checks.	Deposits.	Balance.
1911				
June 20	Balance			9840 52
Aug. 11	418 24			9770 52
Sept. 2	969 50		1454 14	11224 66
7	814 99		4013 17	15237 83
Oct. 11	301 60			15174 15
18	65			15074 15
24	148 50			15073 —
26	45 15			14993 03
30	1131 70		63 68	14984 24
Nov. 21	121		100	14973 79
23	2000 19		1 15	14793 79
Dec. 1	324 18		8 79	14642 43
2	2		10 45	14793 79
5	145		180	14641 83
20	1000		151 36	14510 93
22	71 28		127 95	14510 93
1912			2 95	14400 93
Jan. 3	60		110	
8	175 46		30	14370 93
8	187 04		9	14361 93
10	249		79 57	
12	7 43		191 63	
13	130 26		75	14090 73
16	2 76		150	
19	103 65		100	13765 73
26	158 50		170 25	
Febr. 2	550		96 82	13498 66
" 20	85 46		64 80	13433 86
			814 94	12618 92

		ROBT. MARR		CO., TREAS.			
Date.		Checks in Detail.		Deposits.		Balance.	
1912		Total Checks.		Date.		Checks in Detail.	
						Total Checks.	
						Deposits.	
						Balance.	
Oct.	17	Forward					
"	17	128	75			12618	92
"	19	27				11490	17
"	21	383	75			12463	17
"	23	5				12079	42
"	28	40				12074	42
"	29	123				12034	42
"	30	17				11911	42
Nov.	2	1	44			11894	42
"	4	124	86			11892	98
"	7	1119	70			11768	12
"	11	157	50			10648	42
"	12	6	59			10490	92
"	13	39	66			10484	33
"	20	44	74			10444	67
"	21	99	92			10399	93
"	26	204	75			10300	01
Dec.	2	45	50			10095	26
"	9	75				10049	76
1913						9974	76
Jan.	8	9974	76			000000	00

[Endorsed]: No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. v. Blumauer et al. Plaintiff's Exhibit No. 16. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 16. Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 17—Copy of Account, W. H.

Britt Co., Treas.

W. H. BRITT CO., TREAS.

"COPY OF ACCOUNT."

Date.	Checks in Detail.	Total Checks.	Deposits.	Balance.	Date.	Checks in Detail.	Total Checks.	Deposits.	Balance.
1913					1913				
Jan. 15			9974 76	9974 76	July 10	Forward			14521 16
27	1400 86			8573 90	12		84 47		14436 69
Febr. 1	155 75				Oct. 7		25 62		14411 07
" 1	530 65				9		65		14346 07
" 4			12 91	7887 50	10		526 92		13819 15
" 7			1418 70	9382 11	11		29 35		13789 80
" 13		12 91		9369 20	24		61 79		13728 01
" 14			1905 46	11274 66	Nov. 3		198 29		13529 72
Mar. 3	1 34			11273 32	6		205		13324 72
" 7	193 10			11085 22	8		122 16		13202 56
" 8	85			10995 22	11		6 56		13196
" 10	6274			4721 22	12		199 50		12996 50
" 11	99 75			4621 47	Dec. 1		1 26		12995 24
" 14	28 30			4593 17	5		168 43		12826 81
" 18	23 74			4569 43	6		69 99		12756 82
" 24	76			4493 43	9		11 24		12745 58
" 25	1 51			4491 92	12		1 05		12744 53
" 27	5 30			4486 62	13		1 30		12743 23
April 7	81		808 96	5214 58	20		83 29		12659 94
" 14			5219 58	10434 16	24		247 29		12412 65
May 6	94			10433 22	31		120		12292 65
" 10	11 90			10421 32	1914				
" 15	172 83			10248 49	Jan. 2		65		12227 65
" 24	72			10176 49	3		94 15		12133 50
June 10	164 70			10011 79	7		11 40		12122 10
20			4950	14961 79	10		1 15		12120 95
July 10	440 63			14521 16	12		31 86		12089 09
					20		334 06		11755 03

**Defendant's Exhibit "A"—Application by a Bank or
Trust Company for Depository Bond.**

Agency Bond No.

NATIONAL SURETY COMPANY OF NEW
YORK.

596917

Application by a Bank or Trust Company for a
Depository Bond.

NATIONAL SURETY COMPANY:

Application is hereby made by the undersigned for
a bond, the amount and tenor of which are herein set
forth.

1. Name and location of Bank or Trust Company.
(Give correct corporate title.)—State Bank of
Tenino, Tenino, Wash.
2. Name of Obligee to whom bond is to run.—
Treasurer, Thurston County, Wash.
3. Amount of bond—\$5,000.00.
4. Maximum amount of deposits bond is required
to secure—\$5,000.00.
5. Date from which bond is required—June 22,
1911.
6. Date upon which bond is to terminate—June 22,
1912.
7. Do you agree to pay \$25.00 premium annu-
ally? Yes.
8. When was Bank or Trust Company incorpo-
rated, and under the laws of what State was
the incorporation had? 1906; Washington.
9. Date of beginning business—May 1, 1906.
10. Authorized capital—\$10,000.00.

11. Amount of Stockholders' liability, if a State Bank—\$20,000.00.
12. Paid in capital—\$10,000.00.
13. Attach hereto last published financial statement, and list of officers and directors.
13. When was the last examination made by National or State Bank Examiner? Feb. 6, 1911.
15. Give names and titles of the officers who give continuous personal attention to the affairs of the Bank or Trust Company:

Names	Titles
Isaac Blumauer,	President.
T. F. Mentzer,	Vice-president.
W. Dean Hays,	Cashier.

16. By whom are the loans of the Bank or Trust Company directly authorized.—President and Cashier.

This Agreement Made between State Bank of Tenino (hereinafter called the Depository), and the NATIONAL SURETY COMPANY (hereinafter called the Company),

WITNESSETH:

Whereas, the Company has executed, or is about to execute, for the Depository, the Bond described in the foregoing application, which application is hereby referred to and made a part of this Agreement,

Now, Therefore, In consideration of the execution of such bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company as follows:

1. That all declarations and answers made in the foregoing application are true, and that the

same are made for the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.
3. That the Depository will, at all times, indemnify and keep indemnified the Company, and save it harmless from and against all claims, demands, liabilities, costs, charges and expenses, of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for, and before the Company shall be required to pay thereunder.
4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond.

5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said Bond, and the Company shall at its option, have the right to the use of the Depository's name, and to all the rights and privileges of the Depository, and at any time shall have the right to be discharged from liability for the further default of the Depository, and to require the Depository to account and give new surety or sureties.
6. That vouchers or other evidence of payment by the Company in discharge of any liability under said Bond shall be *prima facie* evidence against the Depository of the fact and amount of the Depository's liability to the Company.
7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof for anything due or to become due the Company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.
8. That the acceptance of this Agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other security, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy, or limit any right or rem-

edy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.

In Witness Whereof, the Depository, by authority of its Board of Directors, or Trustees, has caused this agreement to be duly signed by its President, and Cashier or Secretary, and its corporate seal to be thereto affixed this nineteen day of June, 1911.

[Seal]

STATE BANK OF TENINO,

Tenino, Wash.

W. DEAN HAYS,

Cashier.

ISAAC BLUMAUER,

President.

Signed and sealed in the presence of

T. E. KIRKPATRICK.

[Endorsed]: Defts. Indent. 1, 11/15/16. National Surety Co., 346 Broadway, New York. Application for Depository Bond. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Defendants' Exhibit "A." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit Defendants' Exhibit "A." Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Defendant's Exhibit "B"—Application by a Bank or Trust Company for Depository Bond.

796575

NATIONAL SURETY COMPANY.**CAPITAL \$2,000,000.**

Application by a Bank or Trust Company for
Depository Bond.

NATIONAL SURETY COMPANY:

Application is hereby made by the undersigned for a bond, the amount and tenor of which are herein set forth.

1. Name and location of Bank or Trust Company.
(Give correct corporate title.)—State Bank of Tenino.
2. Name of Obligee to whom bond is to run—W. H. Britt, County Treasurer.
3. Amount of Bond—\$10,000.
4. Maximum amount of deposits bond is required to secure—\$10,000.
5. (a) Specify rate of interest to be paid 2%
(b) moneys covered by this bond.
6. Date from which bond is required—June 22, 1914.
7. Date upon which bond is to terminate—June 22, 1915.
8. Do you agree to pay \$50.00 premium annually—Yes.
9. When was Bank or Trust Company incorporated, and under the laws of what State was the incorporation had? July, 1907, Washington.

10. Date of beginning business—May, 1907. If re-organized, state when.
 11. Authorized capital—\$10,000.
 12. Amount of Stockholders' liability, if a State Bank—\$20,000.
 13. When was last dividend declared, paid and amount.
 14. When was the last examination made by National or State Bank Examiner? Jan. 27, 1914.
 15. Give names and title of the officers who give continuous or personal attention to the affairs of the Bank or Trust Company:
- | Names. | Titles. |
|----------------------------|------------|
| Isaac Blumauer, President. | President. |
| W. Dean Hays, | Cashier. |
16. By whom are the loans of the Bank or Trust Company directly authorized? Pres't and Cashier.
 17. The following is a true financial statement of said Bank or Trust Company, showing its resources and liabilities at the close of business on the 1st day of May, 1914.

RESOURCES.

*Loans and Discounts 61,268 07

*Amount of above loans to directors—none.

What amount secured by collateral.....\$9,099.73.

Amount of above loans to officers, not directors approved by directors—
none.....

.....
What amount secured by collateral.....

Overdrafts, Secured, \$.....; unse- cured \$.....	1,768 83
U. S. Bonds to secure Circulation.....	
Other stocks bonds and mortgages..	12,020 83
Banking House \$.....; Furniture and Fixtures \$.....	4,000
Other Real Estate owned.....	
Due from approved Reserve Agents \$..	
Due from other Banks and Bankers \$.	26,093 89
Checks and other cash Items \$.....	
Fractional currency, Legal Tender Notes,	
Specie, etc. \$.....	3,017 65
Total.....	\$108,169 27

Other Resources.....

Total Resources.....

LIABILITIES.

Capital Stock paid in.....	10,000
Paid in Surplus \$.....; Earned Sur- plus\$.....	
Undivided Profits.....	1,608 29
National Bank Notes outstanding.....	
Due to Banks.....\$.....	372 77
Individual Deposits subject to Check\$76,735.48	
Time Certificates of deposits \$ 4,274.24	
Savings Deposits\$11,735.69	
Other Deposits\$ 3,442.80	
Total.....	96,188 21

Dividends unpaid

Notes and Bills Rediscounted.....

Bills Payable

Other Liabilities.....

Total Liabilities.....\$108,169 27

18. State rate of interest paid on various classes of deposits—2%.

19. Specify Town, City, County and other public or special deposits:

Depositor.	Amount Deposited	Rate Int. %	Surety Bond.	Amt. of Bond.	Date of Expiration.
Tenino,	\$ 3,000	no			
County,	15,000	2			

20. Do officers and employees give Corporate Surety Banks? No.

Give name of Surety—Expiration date.

21. Does Bank carry Burglary Insurance? Yes.

Amount, \$5,000. Name of Company—National.

Expiration—July 29, 1915.

This Agreement Made between State Bank of Tenino (hereinafter called the Depository), and the NATIONAL SURETY COMPANY (hereinafter called the Company),

WITNESSETH:

Whereas, the Company has executed or is about to execute, for the Depository, the Bond described in the foregoing application, which application is hereby referred to and made a part of this Agreement.

Now, Therefore, In consideration of the execution of such bond and the sum of One Dollar paid to the Depository of the Company, the Depository covenants and agrees with the Company as follows:

1 That all declarations and answers made in the foregoing application are true, and that the same are made for the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.
3. That the Depository will, at all times, indemnify and keep indemnified the Company, and save it harmless from and against all claims, demands, liabilities, costs, charges, and expenses, of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments—and—adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.
4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond.
5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said Bond, and the Company shall, at its option, have the right to the use of the Depository's name, and to all the rights and

privileges of the Depository, and at any time shall have the right to be discharged from liability for the further default of the Depository, and to require the Depository to account for and give new surety or sureties.

6. That vouchers or other evidence of payment by the Company in discharge of any liability under said Bond shall be *prima facie* evidence against the Depository of the fact and amount of the Depository's liability to the Company.
7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof for anything due or to become due the Company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.
8. That the acceptance of this Agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other security, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy, or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the

individual surety acting without compensation would have.

In Witness Whereof the Depository, by authority of its Board of Directors, or Trustees, has caused this agreement to be duly signed by its President, and Cashier or Secretary, and its corporate seal to be thereto affixed this 3d day of May, 1914.

(Affix Corporate Seal)

STATE BANK OF TENINO.

(Give Name of Bank.)

By ISAAC BLUMAUER,

President.

Attest: W. DEAN HAYS,

In presence of

Cashier.

[Endorsed]: Defts. Ident. 2. 11/15/16. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co. vs. Blumauer et al. Defendants' Exhibit No. "B." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "B." Filed Apr. 5, 1917. F. C. Monckton, Clerk.

**Defendants' Exhibit "E"—Letter, March 8, 1913,
Mentzer to Blumauer.**

[Letter-head of Mentzer Brothers' Lumber
Company.]

Tacoma, Washington, March 8th, 1913.

Mr. Isaac Blumauer
President State Bank,
Tenino, Wash.

Dear Sir:

I hereby tender my resignation as a member of the Board of Directors of the State Bank of Tenino—and desire you to present my resignation at the first meeting of the Board of Directors held hereafter.

Very respectfully,

T. F. MENTZER.

[Endorsed]: Defts. Indent. "E." 11/15/16. No. 1783. United States District Court, Western District of Washington. Nat. Surety Co., vs. Blumauer et al. Defendants' Exhibit "E." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "E." Filed Apr. 5, 1917. F. D. Monckton, Clerk.

**Defendants' Exhibit "F"—Letter, March 8, 1913,
Mentzer to Blumauer.**

[Letter-head of Mentzer Brothers' Lumber
Company.]

Tacoma, Washington, March 8, 1913.

Mr. Isaac Blumauer,
Pres. State Bank,
Tenino, Wash.,

Dear Sir:

Inclosed herewith I send you my resignation as director of the State Bank. This is in accordance with my intention announced to you last January. In accordance with an agreement understood at the time of the organization of the Bank. I had offered my stock to Mr. Hays, and now offer the same to you—it is for sale. If I can not find a purchaser for it, then you—I mean the Stockholders—may be under the necessity of amending the By laws so as to reduce the number of Directors. The Bank ought to be organized with new blood and new capital. I am willing to step down and out as I do not think I am adding any strength to it at the present time.

Very Truly,

T. F. MENTZER.

[Endorsed]: No. 1783. United States District Court, Western District of Washington. National Surety Co. vs. Blaumauer et al. Defendants' Exhibit "F." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 15, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

No. 2967. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "F." Filed Apr. 5, 1917. F. D. Monckton, Clerk.

Petition for Writ of Error and Supersedeas by Plaintiff.

National Surety Company, plaintiff in the above-entitled action, feeling itself aggrieved by the judgment entered in this cause on the 5th day of February, A. D. 1917, comes now by its attorneys and petitions this court for an order allowing said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the plaintiff in error, being plaintiff in this court, shall give and furnish upon said writ of error, and that upon giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner will ever pray.

C. B. WHITE,
JOHN D. FLETCHER,
ROBT. E. EVANS,

Attorneys for Plaintiff in Error, Being Plaintiff
Below.

(Filed Feb. 6, 1917.) [66]

Assignment of Error.

Comes now the plaintiff in the above-entitled action, being also plaintiff in error, and files the fol-

lowing assignment of errors upon which it will rely upon its prosecution of a writ of error in the above-entitled cause. That the Court erred as follows:

I.

In refusing to allow witness Allen to answer the following question (p. 9, Bill of Exceptions):

“Q. I will ask you, Mr. Allen, what was the purpose of obtaining the release of that first bond?”

II.

In refusing to allow witness Allen to answer the following question (p. 9, Bill of Exceptions):

“Q. I will ask you, Mr. Allen, if between the expiration of the first bond of June 22d, 1911, and the coming into effect of the bond of June 22d, 1914, was there any intervening period at which time the National Surety Company would not have been bound?”

III.

In refusing to allow plaintiff to show that the bond of June 22d, 1914, was a substitution for the bond of June 22, 1911. (See page 9, Bill of Exceptions).

IV.

In refusing to allow plaintiff to show that it is the universal rule to require an application from the applicant for a depository bond. (See p. 11, Bill of Exceptions).

V.

In permitting in evidence Defendants' Exhibit “E.” (P. 18, Bill of Exceptions). [67]

VI.

In admitting in evidence Defendants' Exhibit “F” (See page 18, Bill of Exceptions).

VII.

In sustaining defendants' motion for nonsuit and

dismissal of plaintiff's action, interposed when plaintiff rested its case, said motion reading as follows (Page 20, Bill of Exceptions):

"Mr. PETERSON.—If the Court please, the defendants at this time jointly and severally move the court for a judgment of nonsuit and dismissal of plaintiff's action and for costs on the ground and for the reason that the plaintiff has failed to establish a cause of action against the defendants or either of them, and for the further reason and upon the further ground that the proofs offered by plaintiff show affirmatively that it is not entitled to recover against the defendants or either of them."

VIII.

In discharging the jury from further considering the case (See page 24, Bill of Exceptions).

IX.

In entering judgment in favor of defendants and against plaintiff dismissing this action and for costs against the plaintiff, said judgment being entered February 5th, 1917.

WHEREFORE said plaintiff in error, being plaintiff below, prays that judgment of said court be reversed, and that said District Court be directed to enter a judgment herein in favor of plaintiff and against the defendants and each of them for the sum of \$4,327.87, with 6% thereon from December 30th, 1914, less \$855.82 paid as dividend April 21st, 1915, together with the further sum of \$14.00 expenses in investigating liability, together with plaintiff's costs and disbursements, or, if such judgment is [68] not proper, then that said District Court be directed to grant a new trial of this cause and proceed with

this action in the trial of the same.

C. B. WHITE,

JOHN D. FLETCHER,

ROBT. E. EVANS,

Attorneys for Plaintiff in Error, Being Plaintiff
Below.

(Filed Feb. 6, 1917.) [69]

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

On motion of John D. Fletcher, Esq., one of the attorneys for plaintiff and upon filing the petition for writ of error, and an assignment of error, and upon due notice to defendants and their attorneys it is by the Court

ORDERED that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein on February 5th, 1917, and that the amount of the bond on said writ of error be and hereby is fixed at \$500.00, and upon the giving of such security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 5th day of March, A. D. 1917.

EDWARD E. CUSHMAN,

District Judge.

(Filed March 5, 1917.) [70]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that we, National Surety Company, a corporation as principal, and Globe Indemnity Company, a corp., as surety, are held and firmly bound unto Isaac Blumauer, W. Dean Hays and Ora J. Hays, his wife, T. F. Mentzer and Elizabeth E. Mentzer, his wife, A. D. Campbell and Jessie E. Campbell, his wife, David Copping and Eva Copping, his wife, defendants above named, and to each of them, in the sum of \$500.00 to be paid them and each of them, their executors and administrators, for which payment well and truly to be made, we bind ourselves and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 7th day of March, A. D. 1917.

WHEREAS the National Surety Company, the above-named principal, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, rendered and entered on February 5th, 1917.

NOW THEREFORE the condition of this obligation is such that if the above-named plaintiff National Surety Company, principal in this bond, shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea, then

this obligation shall be void; otherwise to remain in full force and virtue.

[Corporate Seal of National Surety Company].

NATIONAL SURETY COMPANY,

By C. B. WHITE,
Its General Attorney.

[Corporate Seal of Globe Indemnity Company].

GLOBE INDEMNITY COMPANY,

By L. N. BREWER,
Attorney in Fact. [71]

By H. J. RAMSEY,
Attorney in Fact.

Attest: C. E. McLAIN.

The above bond and sufficiency of surety upon the same are hereby approved this 8th day of March, A. D. 1917.

EDWARD E. CUSHMAN,
District Judge.

(Filed March 8, 1917.) [72]

Stipulation Regarding Transcript of Record.

IT IS HEREBY STIPULATED by and between the respective parties that the transcript made by the Clerk of this Court for the Circuit Court of Appeals for the Ninth Circuit, may have omitted therefrom the following:

1. The original complaint.
2. The original and first amended answer of defendants T. F. Mentzer and Elizabeth E. Mentzer, his wife, and David Copping and Eva Copping his wife, to the Complaint and the first amended answer to the amended complaint and the motions and demurrers to the answers and the orders thereon.

3. All captions except to the amended complaint.

4. All endorsements, file marks, verifications and acceptances of service on the pleadings, stipulations and orders.

C. B. WHITE,

JNO. D. FLETCHER,

ROBERT E. EVANS,

Attorneys for Plaintiff in Error.

TROY & STURDEVANT,

BATES & PETERSON,

Attorneys for Defendants in Error.

(Filed March 8, 1917.) [73]

Stipulation as to Original Exhibits.

IT IS HEREBY STIPULATED between the respective parties to this action, that the original exhibits introduced in evidence in the court below, may be attached by the Clerk of this Court to the bill of exceptions and transmitted to the Circuit Court of Appeals for the Ninth Circuit, in lieu of copies, and that the Judge who tried this cause may make an order to that effect.

C. B. WHITE,

JOHN D. FLETCHER,

ROBERT E. EVANS,

Attorneys for Plaintiff in Error.

TROY & STURDEVANT,

BATES & PETERSON,

Attorneys for Defendants in Error.

(Filed March 8, 1917.) [74]

**Order Directing Original Exhibits Instead of
Copies to be Forwarded to Circuit Court of
Appeals.**

NOW ON THIS 8th day of March, A. D. 1917,
on stipulation of the respective parties through their
attorneys,

IT IS HEREBY ORDERED that the clerk of
this court do attach the original exhibits introduced
in evidence in the trial of his cause to the bill of ex-
ceptions and transmit them to the United States Cir-
cuit Court of Appeals for the Ninth Circuit in lieu
of copies.

EDWARD E. CUSHMAN,

Judge.

(Filed March 8, 1917.) [75]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, clerk of the United States
District Court for the Western District of Washing-
ton, do hereby certify and return that the foregoing
is a true and correct copy of the record and pro-
ceedings in the case of National Surety Company,
plaintiff, versus Isaac Blumauer, W. Dean Hays
and Ora J. Hays, his wife, T. F. Mentzer and
Elizabeth E. Mentzer, his wife, A. D. Campbell and
Jessie E. Campbell, his wife, David Copping and
Eva Copping, his wife, defendants, as required by
praecipe of Counsel filed and shown herein, and as
the originals thereof appear on file and of record

in my office in said District at Tacoma; and that the same constitute my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original writ of error and original citation together with original stipulation of counsel as to printing record; and that I am transmitting herewith, duly certified and attached to the bill of exceptions herein, the original exhibits called for in stipulation of counsel and order of Court for transmission of the same to the Circuit Court of Appeals.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [76]

Clerk's fees (Sec. 828 R. S. U. S.) for making	
record, certificate and return, 186 folios at	
15¢ each	\$27.90
Certificate of Clerk to Transcript, 3 folios at	
15¢ each, and Seal65
Certificate of Clerk to original exhibits, 3	
folios at 15¢ each, and Seal.....	.65

Attest my hand and the seal of said District Court at Tacoma, in said District, this 31st day of March, A. D. 1917.

[Seal]

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger,
Deputy Clerk. [77]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —

NATIONAL SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA
HAYS, His Wife, T. F. MENTZER and
ELIZABETH E. MENTZER, His Wife, A.
D. CAMPBELL and JESSIE E. CAMP-
BELL, His Wife, and DAVID COPPING
and EVA COPPING, His Wife,
Defendants in Error.

Writ of Error.

United States of America.

The President of the United States of America, to
the District Court of the United States for the
Western District of Washington, Southern Di-
vision, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment before you, between
said National Surety Company, plaintiff below and
plaintiff in error, and Isaac Blumauer, W. Dean
Hays and Ora Hays, his wife, T. F. Mentzer and
Elizabeth E. Mentzer, his wife, A. D. Campbell
and Jessie E. Campbell, his wife, and David Cop-
ping and Eva Copping, his wife, defendants below
and defendants in error, a manifest error hath
happened to the damage of said National Surety
Company, we being willing that such error, if any

hath happened, should be duly corrected, and full and speedy justice done to the plaintiff in error aforesaid, on this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the Courtrooms of such Court in the city of San Francisco, State of California, together with this writ, so that you have the same at said place before the Justices aforesaid on thirty days from the date of this writ. That the record and proceedings aforesaid being inspected, said justices of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of March A. D. 1917.

[Seal]

FRANK L. CROSBY,
Clerk of the District Court of the United States for
the Western District of Washington,

By F. M. Harshberger,
Deputy Clerk.

The foregoing writ is hereby allowed this 8th day of March A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

Service of the foregoing writ is hereby acknowl-

edged by receipt of copy of same, this 8th day of March, A. D. 1917.

TROY & STURTEVANT,
BATES & PETERSON,
Attorneys for Defendants in Error.

[Endorsed]: No. ————. In the United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Plaintiff in Error, vs. Isaac Blumauer et al., Defendants in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. ———

NATIONAL SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA
HAYS, His Wife, T. F. MENTZER, His
Wife, A. D. CAMPBELL and JESSIE E.
CAMPBELL, His Wife, and DAVID COP-
PING and EVA COPPING, His Wife,
Defendants in Error.

Citation on Writ of Error.

United States of America.

The President of the United States of America to
Isaac Blumauer, W. Dean Hays and Ora Hays,
His Wife, T. F. Mentzer and Elizabeth E. Ment-
zer, His Wife, A. D. Campbell and Jessie E.
Campbell, His Wife, and David Copping and
Eva Copping, His Wife, Defendants in Error,
Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, within thirty (30) days
from the date hereof, pursuant to the writ of error
filed in the clerk's office of the United States District
Court for the Western District of Washington,
Southern Division, wherein the National Surety
Company, a corporation is plaintiff in error and you
are the defendants in error, and show cause if any
there be, why the judgment rendered against said
plaintiff in error as in said writ of error mentioned
should not be corrected, and why speedy justice
should not be done to the parties in that behalf.

WITNESS The Honorable EDWARD D.
WHITE, Chief Justice of the United States, this
8th day of March A. D. 1917.

[Seal] EDWARD E. CUSHMAN,
District Judge.

Service of the foregoing citation by receipt of copy
thereof admitted this 8th day of March A. D. 1917.

TROY & STURDEVANT,
BATES & PETERSON,
Attorneys for Defendants in Error.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Plaintiff in Error, vs. Isaac Blumauer et al., Defendants in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

NATIONAL SURETY COMPANY, a Corporation,
Plaintiff,

vs.

ISAAC BLUMAUER et al.,
Defendants.

Stipulation as to Printing Record.

IT IS STIPULATED by and between the respective parties, that the clerk of the above-named court may, in printing the record, eliminate therefrom the following:

1. The original complaint.
2. The original and first amended answer of defendants T. F. Mentzer and Elizabeth E. Mentzer David Copping and Eva Copping to the complaint and the first amended answer to the amended complaint and the motions and demurrers to the answers and the orders thereon.
3. All captions, except to the amended complaint.

4. All endorsements, file-marks, verifications and acceptances of service on the pleadings, stipulations and orders.

5. Exhibit 18, being copy of minutes of trustees' and stockholders' meeting of State Bank of Tenino.

C. B. WHITE,

JOHN D. FLETCHER,

ROBERT E. EVANS,

Attorneys for Plaintiff in Error.

TROY & STURDEVANT,

BATES & PETERSON,

Attorneys for Defendants in Error.

[Endorsed]: No. 1783. In the United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, Plaintiff, vs. Isaac Blumauer, et al., Defendants. Stipulation as to Printing Record. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2967. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Plaintiff in Error, vs. Isaac Blumauer, W. Dean Hays and Ora J. Hays, His Wife, T. F. Mentzer and Elizabeth E. Mentzer, His Wife, A. D. Campbell and Jessie E. Campbell, His Wife, David Copping and Eva Copping, His Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United

States District Court of the Western District of
Washington, Southern Division.

Filed April 5, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE 10
**United States Circuit Court
of Appeals**
for the Ninth Circuit

NATIONAL SURETY COMPANY, a corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA J. HAYS,
his wife; T. F. MENTZER and ELIZABETH E. MENT-
ZER, his wife; A. D. CAMPBELL and JESSIE E. CAMP-
BELL, his wife; DAVID COPPING and EVA COPPING,
his wife,

Defendants in Error.

Brief of Plaintiff in Error

C. B. WHITE,

Seattle, Washington;

JOHN D. FLETCHER,

ROBERT E. EVANS,

Tacoma, Washington,

Attorneys for Plaintiff in Error.

IN THE
**United States Circuit Court
of Appeals**
for the Ninth Circuit

NATIONAL SURETY COMPANY, a corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA J. HAYS,
his wife; T. F. MENTZER and ELIZABETH E. MENT-
ZER, his wife; A. D. CAMPBELL and JESSIE E. CAMP-
BELL, his wife; DAVID COPPING and EVA COPPING,
his wife,

Defendants in Error.

Brief of Plaintiff in Error

No. 2967.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE
NINTH CIRCUIT.

NATIONAL SURETY COMPANY, a corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA J. HAYS,
his wife; T. F. MENTZER and ELIZABETH E. MENT-
ZER, his wife; A. D. CAMPBELL and JESSIE E. CAMP-
BELL, his wife; DAVID COPPING and EVA COPPING,
his wife,

Defendants in Error.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

The Plaintiff in Error, National Surety Company, is a corporation, incorporated under the laws of the State of New York, and a citizen and resident of that State, and during all the times in the proceedings mentioned, was and still is lawfully engaged in the Surety business in the State of Washington and qualified to maintain this action (T. of R. pg. 75).

The defendants in error at all times were and

still are citizens and residents of the State of Washington.

The State Bank of Tenino, hereafter called the Bank, at all times mentioned, was a State Bank of the State of Washington, located at Tenino, Thurston County, Washington, with a capital stock of \$10,000.00 divided into 100 shares. The defendants in error owned stock in the Bank as follows: Blumauer, 11 shares; Mentzer, 5 shares; Copping, 10 shares; Campbell, 10 shares; Hays, 51 shares; thus owning all except 12 shares of the capital stock of the Bank (T. of R. pg. 70). The minutes of the stockholders' meetings of the Bank show that Blumauer was at all times President; Hays, Cashier; Mentzer, Vice-President and Director, and Campbell Assistant Cashier and Director (T. of R. pg. 71).

Defendants, T. F. Mentzer and Elizabeth E. Mentzer are husband and wife; A. D. Campbell and Jessie E. Campbell are husband and wife, and at the time suit was brought defendants, David Copping and Eva Copping were husband and wife. Since that time, however, David Copping died, but before his death he had conveyed to his wife, Eva Copping, all of his property, all of which was their community property. Defendants, Blumauer, Hays and Hays' wife made default in the action. The contesting defendants being

Mentzer and wife, Mrs. Eva Copping and Campbell and wife.

Shortly prior to June 22, 1911, the Bank desiring to become a depository of public funds of Thurston County, Washington, made application to the plaintiff to become surety for it on the bond required by the laws of the State of Washington, to be taken by the County Treasurer to secure bank deposits of County funds.

The application for the bond is defendant's Exhibit "A" (T. of R. pg. 125). It shows an application for a \$5,000.00 bond to be dated June 22, 1911, the obligee to be "Treasurer, Thurston County, Wash." That the officers of the Bank who give personal attention to its business are Isaac Blumauer, President; T. F. Mentzer, Vice-President, and W. Dean Hays, Cashier. The application states that the Bank "will at *all times* indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, and liabilities, etc., of every kind and nature" (T. of R. pg. 127). This application was made by authority of the Board of Directors of the Bank, consisting of Blumauer, Mentzer, Campbell and Hays (T. of R. pg. 129).

At the time of the execution of the bond so applied for plaintiff demanded to be indemnified by the

personal obligation of the defendants who were stockholders, officers and directors of the Bank (T. of R. pg. 58) and pursuant thereto, plaintiff as surety for the bank executed the bond—plaintiff's Exhibit 1 (T. of R. pg. 87 and fol.) and the defendants executed and delivered the indemnity agreement—plaintiff's exhibit 2 (T. of R. pg. 96 and fol.).

The bond (T. of R. pg. 87 and fol.) binds the Bank as principal and plaintiff as surety unto Robert Marr individually, and as County Treasurer of the County of Thurston, State of Washington, in the sum of \$5,000.00.

It recites among other things the following: "THE CONDITION OF THIS OBLIGATION IS SUCH, that, whereas the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such Treasurer, at the special instance and request of the said State Bank of Tenino, has deposited, or may hereafter, from time to time, deposit with, and place in charge of the said principal hereinbefore named, certain moneys, checks, etc., for the custody or for the proceeds of the face value of which the said Treasurer as such, may be responsible." The Bond covenants to pay the Treasurer, upon his check, for all deposits with certain other covenants and conditions set forth

in the Bond. The Bond is dated June 22, 1911, and is executed on behalf of the Bank by Blumauer, President, and Hays, Cashier.

The indemnity agreement recites among other things that the signers have *requested* the plaintiff to execute a Bond in the sum of \$5,000.00 in behalf of the Bank, in favor of the *Treasurer* of Thurston County, Washington, effective June 22, 1911, covering deposits of the Treasurer in said Bank, and further recites that, whereas the plaintiff is about to execute such Bond upon the security and indemnity hereby and herein provided,

NOW, THEREFORE, in consideration of the premises and the sum of One Dollar, the signers covenant and agree with the plaintiff as follows:

FIRST. To pay an annual premium of \$25.00 for the *accommodation* afforded the signers until the plaintiff shall have been fully discharged from liability on said instrument and on matters arising therefrom and *until* there shall have been furnished to the plaintiff at its principal office in the City of New York, proof of such discharge;

SECOND. The signers were to at all times indemnify and keep indemnified the plaintiff and save it harmless from all liability which it shall at any time

incur in consequence of having executed the Bond, and if claims were made, which in the judgment of the plaintiff, should be paid the signers agreed on demand to pay the same, would defend all suits brought by claimants against the plaintiff, or the plaintiff could defend, they paying the costs and attorney's fees, to pay any judgments, the plaintiff's vouchers for any payments to be prima facie evidence of the fact and the amount of the signers' liability;

FOURTH. The plaintiff may at any time take steps to be released from liability under said bond, or *under any other instrument* within the meaning of Section Fifth hereof;

"FIFTH. That no act or omission of the Company in modifying, amending, limiting or extending the instrument so executed by the Company shall in any wise affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof or other and new obligation in its place or in lieu thereof, and without notice to us, notice being expressly waived, and in any such case we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended,

limited or extended instrument, or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein."

SEVENTH. The indemnity agreement binds not only the signers jointly and severally, but their heirs, executors, administrators, and assigns "*until the Company shall have executed a release under its corporate seal, attested by the signatures of its officers proper for the purpose.*"

EIGHTH. The covenants shall be available to the plaintiff as well concerning any or all former or subsequent bonds or undertakings executed for them or at the instance of any of them as concerning the original Bond.

The indemnity agreement is dated June 22, 1911, and signed by all the defendants together with the Bank, signing through its President, Blumauer, and its Cashier, Hays.

The Statute of the State of Washington, regarding the depositary for County funds is found in Session Laws 1907, page 74, and following, and it provides that the several County Treasurers of the State of Washington shall annually in January, designate one or more Banks in the State as depositaries of pub-

lic funds held or required to be kept by such Treasurers. Such designation to be in writing and filed with the Board of County Commissioners of the County, and no County Treasurer shall deposit public moneys in any Bank except as provided in the Statute. Upon such designation the Bank is to file a surety bond with the Clerk of the County, conditioned for the prompt and faithful payment of checks drawn by the Treasurer. The Bond is to be approved by certain County Officials. The Treasurer is to deposit, in such depository Banks, County moneys under his official control, and for the purpose of quarterly settlements and counting the funds in the Treasurer's hands, such deposits shall be deemed to be in the County Treasury. The indemnity agreement nowhere names the Treasurer but only speaks of the Treasurer of Thurston County.

When the depository bond and indemnity agreement were delivered the \$25.00 premium was paid to the plaintiff. Robert Marr's term as Treasurer for which he had been elected would expire on January 8, 1913.

Prior to June 22, 1912, when the first year of the bond would expire for which the annual premium had been paid, the Bank acting through indemnitor, Hays, paid plaintiff \$25.00 as and for a second year's pre-

mium on the bond, continuing the bond until June 22, 1913. The plaintiff's receipt therefor, dated June 22, 1912, was filed with the County Clerk and attached to the bond (T. of R. pg. 55). With this receipt the Bank wrote to Treasurer Marr as follows:

"June 7, 1912.

Hon. Robert Marr, Treasurer, Olympia, Washington. Enclosed herewith is letter from National Surety Company in re, \$5,000 depository bond which indicates that same is continuous upon payment of the premium which we have this day remitted. But if there is any further evidence on the payment we will be glad to furnish it. With kind personal regards, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, V.-President."

(T. of R. pg. 56).

As above stated, Robert Marr's term as County Treasurer expired January 8, 1913, and on that date W. H. Britt succeeded him in office, and the bond thus extended would run over into his term to June 22, 1913.

Prior to June 22, 1913, when the second year of the bond would expire for which the annual premium had been paid the Bank acting through indemnitor Hays, paid the plaintiff \$25.00 as and for a third year's premium, extending the bond to June 22, 1914. The plaintiff's receipt therefor, dated June 22, 1913, was

filed with the County Clerk and attached to the bond (T. of R. pgs. 56-57). With this receipt the Bank wrote to Treasurer Britt, successor in office to Treasurer Marr, as follows:

"June 13, 1913.

Mr. W. H. Britt, County Treasurer,
Olympia, Washington.

Dear Sir: Enclosed please find herewith receipt for premium on bond No. 596,617, National Surety Company for \$5,000 which expires on June 22, which continues same in force for one year. Thanking you to acknowledge receipt of the same, I am

Very truly yours,

W. DEAN HAYS, Cashier."

(T. of R. pg. 57.)

It appears that the receipt, dated June 22, 1911, above mentioned, was lost and there was filed with the County Clerk a duplicate receipt with a letter from the plaintiff, acting through its Agency Secretary, Mr. Welch, to Mr. Hays as Cashier of the Bank, which letter reads as follows:

"January 24, 1913.

Dear Sir: Acknowledging your esteemed favor of the 20th inst. herewith duplicate receipt which renews your depository bond in favor of Treasurer of Thurston County, Washington, from June 22, 1912, until June 22nd, 1913. Trusting this is satisfactory, and with kindest regards, I am

Yours very truly,

EDW. P. WELCH, Secy."

(T. of R. pgs. 57-58.)

This was after Britt had taken office.

Prior to June, 1914, when the third year of the bond would expire for which the annual premium had been paid, the plaintiff billed the bank for the ensuing year's premium extending the bond to June 22, 1915. The Bank, acting through indemnitor Hays, paid the premium and the following correspondence took place between the Bank, the plaintiff, and Treasurer Britt:

"Tenino, Washington, May 22, 1914.

George W. Allen & Co.,
Alaska Bldg.,
Seattle, Washington:

My Dear George:

Enclosed herewith is a draft for \$25.00 in payment for renewal of depository bond.

In this connection I desire to state that our county treasurer is Mr. W. H. Britt who succeeded Robert Marr, and if necessary please make an endorsement to that effect.

Thanking you for your attention in this matter,
I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, V.-President."
(T, of R. pg. 106.)

"Tenino, Washington, May 25, 1914.

George W. Allen & Co.,
Alaska Bldg.,
Seattle, Washington.

My Dear George:

Your favor the 23rd inst. enclosing receipt for annual premium has been received and in connection

therewith beg to state that Mr. W. H. Britt was elected to succeed Mr. Robert Marr at the election two years ago, hence I imagine that it is necessary for you to issue a new bond, which I trust you will do and forward to us, the same bond has been renewed once or twice since Mr. Britt assumed office.

Thanking you for your attention in this matter,
I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, V.-President."
(T. of R. pg. 107.)

"May 26, 1914.

Mr. W. Dean Hays, Vice President,
State Bank of Tenino,
Tenino, Washington.

My Dear Dean:

Acknowledging your esteemed favor of the 25th instant, we enclose herewith new bond duly executed in favor of W. H. Britt, County Treasurer of Thurston County, Washington, effective June 22d, 1914. We think it best that a new bond be filed as of the anniversary date of the former bond, and we will, therefore, require new application signed by your good institution, which kindly let us have, together with copy of your latest financial statement, by return mail. It will also be necessary that the enclosed release be signed by the Treasurer covering the former bond, as the same by its terms is continuous, and we must have this release to enable our home office to relieve our account of future premiums.

Thanking you to let us have the application and release promptly, and with kindest regards, I remain,

Very truly yours,
GEO. W. ALLEN,
Manager."

GWA. RW.

(T. of R. pg. 108.)

"Olympia, Washington, May, 26/14.

State Bank,
Tenino, Wash.

Gentlemen:

I just received renewal certificate from National Surety Company, which runs to Robt. Marr, which should not be so. I am of the opinion, that, as the bond is made to Robt. Marr as County Treasurer, it would be much better to have a new bond made in my name as County Treasurer.

Please take this matter up at once and have the change made as soon as possible.

I return the Certificate just received herewith.

Yours truly,

W. H. BRITT."

(T. of R. pg. 110.)

"May 29, 1914.

Mr. W. H. Britt, Treas.,
Olympia, Wash.

My Dear Mr. Britt:

You will herewith please find Depository Bond of the National Surety Company of New York in your favor for \$5000.00 maturing June 22, 1915, *to take the place of* the one heretofore issued to Robert Marr as Treasurer.

You will also find two blank releases for the former bond which you will kindly sign and return to us.

Thanking you for your attention to this matter and trusting that you will find everything satisfactory, I am

Very truly yours,

STATE BANK OF TENINO,

W. Dean Hays, President."

(T. of R. pg. 111.)

As a result of this correspondence a depository bond, dated June 22, 1914, was *substituted* for the original depository bond, dated June 22, 1911. This bond is Exhibit 10 and appears in the Transcript of Record, page 112 and following. See also Transcript of Record, page 61 and following.

When this bond was substituted the original bond was released, and Treasurer Britt executed and delivered to plaintiff a release to be effective June 22, 1914, the date the substituted bond would become operative. This release is Exhibit 11, and appears in Transcript of Record, page 116 as follows:

“National Surety Company,
New York.

Gentlemen:

As surety on that certain depository bond, dated June 22d, 1911, in behalf of the State Bank of Tenino, in favor of Robert Marr, Treasurer, Thurston County, Washington, in the penalty of \$5,000, you are released from further liability thereunder, from and after the 22d day of June, 1914.

W. H. BRITT,
Treasurer, Thurston County, Wn.”

Plaintiff was prevented by the Court on defendants' objection from explaining the above transaction by which the original bond was released and the bond of June 22, 1914, substituted therefor. The purpose of such testimony, among other things, going to show

that otherwise there would be two bonds when only one was desired.

Plaintiff asked Witness Allen, its general agent for Western Washington, the purpose of making the release become effective on June 22, 1914, but was not permitted by the Court to answer over the objection of defendants. He was also asked the purpose of obtaining the release of the original bond when substituting the bond of June 22, 1914. This was also refused by the Court on defendants' objection. He was also asked if there was any period between the release of the original bond and the coming into effect of the substituted bond during which time the plaintiff would not have been bound. He answered "No sir, I ————" and was interrupted by the objection of the defendants which was sustained by the Court. Plaintiff then stated that it desired to show by the witness that one bond was a substitution for the other. The Court sustained the objection and stated: Court—"It seems that everybody in the room is about as well qualified to answer the question as he is. It all seems to be in writing."

Plaintiff was allowed exceptions to the foregoing adverse rulings, and it all appears in the Transcript of Record on pages 62 and 63, and in the Assignment of Errors on page 140.

During all the time above mentioned the Indemnity Agreement given by the defendants to the plaintiff, at the time the original bond of June 22, 1911, was executed was in plaintiff's possession in its home office in New York. No new or other indemnity agreement was given and the indemnity agreement was never released or surrendered (T. of R. pg. 63).

Preceding the giving of the bond on June 22, 1911, the Bank made application for the same on a form furnished by the plaintiff and the same is true of the substituted bond of June 22, 1914 (Exhibits "A" and "B," T. of R. pgs. 64, 125 and following). Such applications are made by a Bank seeking a Depositary Bond for the purpose of giving the Surety Company information in connection with the application and the details of the bond applied for.

The Indemnity Agreement is signed by the applicant Bank with other signers indemnifying the Surety Company against the loss on the bond (T. of R. pg. 65).

Plaintiff offered to show that it is the universal rule to require applications for a bond from the applicant Bank. This offer on defendant's objection was refused by the Court, with exception to plaintiff (T. of R. pg. 64; Assignment of Errors, pg. 140).

During the fourth year and less than three months after the substituted bond of June 22, 1914, had been given, to-wit, on September 17, 1914, the Bank closed its doors, and R. A. Langley was appointed by the Court as receiver of the Bank.

The Bank's books produced by Receiver Langley, show as follows: Treasurer Marr as County Treasurer of Thurston County, opened an account with the Bank on June 20, 1911, and closed it on January 8, 1913, the day his term of office expired and Treasurer Britt succeeded him (T. of R. pg. 67). His account (Exhibit 16, T. of R. pg. 121), shows checks and deposits, his balance varying from \$9,000 to \$15,000, his balance on January 8, 1913, being \$9,974.76.

Treasurer Britt's account (T. of R. pg. 123), was opened on January 15, 1913, with a deposit of \$9,974.76, and when the Bank closed its doors on September 17, 1914, he had a balance on deposit of \$12,823.58.

When Treasurer Marr went out of office as County Treasurer on January 8, 1913, he took from the Bank a Demand Certificate No. 1098, for \$9,974.76. He never cashed this certificate, or actually drew any money out of the Bank.

When Treasurer Britt opened his account on Jan-

uary 15, 1913, he deposited this same certificate as the commencement of his account with the Bank (T. of R. pg. 69 and fol.) His balance ranged up to \$15,000 and was \$12,923.58 when the Bank failed (Exhibit 17, T. of R. pg. 123).

The Treasurer of Thurston County, when the Bank failed, demanded that plaintiff pay its liability on its bond amounting to \$4,327.87. Plaintiff made demand on defendants to pay this which they refused to do, and plaintiff, on December 30, 1914, paid to the Treasurer of Thurston County its liability amounting to \$4,327.87. Plaintiff paid for investigating its liability an expense account of \$14.00.

Plaintiff on April 21, 1915, received a dividend from Receiver Langley, amounting to \$855.82 which was to be credited on the above payment made by it to the County Treasurer. No other payment has been made to plaintiff, and if it is entitled to recover against the defendants its judgment should be for \$4,327.87 together with the \$14.00 expense paid, with 6% per annum interest from December 30, 1914, to April 21, 1915, on which date the dividend of \$855.82 was paid. Deducting this from the above principal and interest would leave a balance of \$3,564.23, which would draw 6% per annum interest from April 21, 1915, until paid which would be the amount of the judgment and the

costs to follow (T. of R. pg. 74 and fol.) Treasurer Britt died prior to the commencement of this action.

At the conclusion of plaintiff's testimony which shows the foregoing facts, the defendants moved the Court for a non-suit and a dismissal of plaintiff's action on the grounds that plaintiff had failed to prove a cause of action and that its proof showed affirmatively that plaintiff was not entitled to recover (T. of R. pg. 76).

The Court granted the motion on the ground that the original bond, dated June 22, 1911, only secured money deposited by or for Treasurer Marr, that the indemnity agreement indemnified plaintiff against loss by reason of this bond, that Section FIFTH of the indemnity agreement (T. of R. pg. 111), did not authorize the substitution of the bond dated June 22, 1914, but would only authorize changes in the original instrument such as by interlineation, or details on the face of the original bond to make it more complete or full, but not changes that would make it different or contrary to its main purpose, that Section FIFTH should be given a more narrow meaning than its words might otherwise convey (T. of R. pg. 76 and fol.)

The Court then discharged the jury and directed defendants to prepare a judgment according to its

ruling. Plaintiff's exceptions were taken and allowed to the ruling and to the discharge of the jury (T. of R. pg. 80).

On February 5, 1917, judgment was entered dismissing plaintiff's action with costs to defendants to which exception was allowed plaintiff (T. of R. pg. 50).

Plaintiff filed its petition for Writ of Error and filed its Assignment of Errors to reverse said judgment, and to cause the District Court to be directed to enter a judgment in favor of plaintiff and against the defendants for the amount above stated, or if such judgment is not proper, then that the District Court be directed to grant a new trial and proceed with the action (T. of R. pg. 139 and following).

The Writ of Error was regularly allowed and the proper bond on the writ approved by the Court was filed, and the Writ of Error and Citation thereon issued (T. of R. pgs. 142-143-148-151).

ASSIGNMENT OF ERRORS.

(T. of R. pg. 140 and following.)

Plaintiff claims that the Court erred as follows:

I.

“In refusing to allow witness Allen to answer the following question: ‘Q. I will ask you, Mr. Allen, what was the purpose of obtaining the release of that first bond?’

II.

In refusing to allow witness Allen to answer the following question: ‘Q. I will ask you, Mr. Allen, if between the expiration of the first bond of June 22d, 1911, and the coming into effect of the bond of June 22d, 1914, was there any intervening period at which time the National Surety Company would not have been bound?’

III.

In refusing to allow plaintiff to show that the bond of June 22d, 1914, was a substitution for the bond of June 22, 1911.

IV.

In refusing to allow plaintiff to show that it is the universal rule to require an application from the applicant for a depository bond.

V.

In admitting in evidence Defendants’ Exhibit ‘E’.

VI.

In admitting in evidence Defendants' Exhibit 'F'.

VII.

In sustaining defendants' motion for non-suit and dismissal of plaintiff's action, interposed when plaintiff rested its case, said motion reading as follows:

'MR. PETERSON.—If the Court please, the defendants at this time jointly and severally move the Court for a judgment of non-suit and dismissal of plaintiff's action and for costs on the ground and for the reason that the plaintiff has failed to establish a cause of action against the defendants or either of them, and for the further reason and upon the further ground that the proofs offered by plaintiff show affirmatively that it is not entitled to recover against the defendants or either of them.'

VIII.

In discharging the jury from further considering the case.

IX.

In entering judgment in favor of defendants and against plaintiff, said judgment being entered February 5th, 1917."

ARGUMENT.

The assignments I to VI are of no great importance in view of the Court's decision.

As assignments VII to IX all involve the same error, that is the dismissal of the action, we will discuss them together.

Did plaintiff submit evidence sufficient to entitle it to have the case submitted to the jury for its verdict?

SITUATION OF THE PARTIES.

The Bank of Tenino wanted to be a depository of County funds, and to become such it required a surety bond. The ownership of the Bank was almost solely in the defendants who were its officers and controlled its business.

The Bank signing by two of the defendants, Blumauer, its President, and Hays, its Cashier, made a written application to plaintiff for such bond. Plaintiff agreed to write the bond provided the defendants, who practically owned the Bank and solely had charge of its affairs, would indemnify it against loss.

The bond was given and the defendants executed and delivered to plaintiff the indemnity agreement. This was done in order that the Bank could become a depository of County funds and for the purpose of securing the County against loss of any money of the County that should be deposited in the Bank by the County Treasurers. It was in no sense a personal

matter of Marr's but a public matter securing public funds belonging to the County and deposited by whomsoever might be County Treasurer. This is not only true in fact, but was so acted upon by defendants as officers of the Bank, for after Marr was succeeded by Britt as County Treasurer, the same bond was continued in force and accepted by the County by merely the payment of an annual premium.

This indemnity agreement signed by the defendants recites that the defendants requested plaintiff to write the bond in favor—not of Marr as County Treasurer—but in favor of the *Treasurer of Thurston County, Wash.*, to cover—not deposits of Marr—but deposits of the *said Treasurer*.

The agreement recites that the bond was or was about to be signed by the plaintiff upon the security and indemnity contained in the indemnity agreement, that the consideration for their signing the indemnity agreement was the premises and One Dollar and they agreed as follows:

FIRST. The indemnitors agree to pay plaintiff \$25.00 for its *accommodation* to them and to pay said sum *annually in advance* on June 22, of each and every year during the time plaintiff should continue liable and until plaintiff should be discharged from liability

on the bond and on all matters arising therefrom and until "*there shall have been furnished to the Company at its principal office in the City of New York, due and satisfactory proof by evidence legally competent of such discharge and release* (T. of R. pg. 98).

SECOND. The indemnitors agree to at all times indemnify the plaintiff against all liability which it might sustain in consequence of having executed the bond.

FOURTH. The plaintiff could take necessary steps to be released from the bond or from "*any other instrument within the meaning of Section Fifth hereof.*

"FIFTH. That no act or omission of the Company in modifying, amending, limiting or extending the instrument so executed by the Company shall in any wise affect our liability hereunder, nor shall we nor any of us be released from this obligation by reason thereof; *and we agree that the company may alter, change or modify, amend, limit or extend said instrument and may execute renewal thereof or other and new obligation in its place or in lieu thereof, and without notice to us, notice being expressly waived,* and in any such case we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended, limited

or extended instrument, or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein." (T. of R. pg. 101).

SEVENTH. The indemnity agreement binds the indemnitors jointly and severally, and their heirs the indemnitors jointly and severally, and their heirs and assigns "*until the Company shall have executed a release under its corporate seal, attested by the signatures of its officers proper for the purpose.*" (T. of R. pg. 102).

"EIGHTH. That these covenants as also all collateral securities or indemnity, if any, at any time deposited with or available to the Company concerning any bond or undertaking executed for or at the instance of us, or any of us, shall, at the option of the Company, be available in its behalf and for its benefit and relief as well concerning any or all former or subsequent bonds or undertakings executed for us, or at the instance of us, or any of us, as concerning the bond or undertaking such covenants, collateral securities or indemnity shall have been made, deposited or given." (T. of R. pg. 102).

Upon the bond being approved by the proper

County Officials and filed with the County Clerk, the Bank became a depository for County funds which should come into the hands of the County Treasurer. Robert Marr was then County Treasurer and he commenced depositing County moneys in the Bank and continued to do so during his term of office which expired on January 8, 1913.

The first premium carried the bond to June 22, 1912, at which time the Bank being still practically owned by the defendants and under their sole management paid the annual premium which continued the bond to June 22, 1913, or beyond Marr's term of office. No new bond was demanded or taken or no new indemnity agreement was delivered but the old bond was thus continued beyond Marr's term to June 22, 1913, and the indemnity agreement was held by the plaintiff.

The defendants do not contend that the indemnity agreement terminated at the end of the first year or June 22, 1912.

In their answer they claim:

FIRST. That the bond expired on January 8, 1913, when Marr's term ended.

SECOND. That it expired on June 22, 1914, when the substituted bond was taken and the old bond

released, though it is not claimed that on either of these dates there was in fact any release of liability as in Section First of the indemnity agreement required, or that the plaintiff had released the indemnitors as in Section Seventh of the indemnity agreement required, nor in fact did the indemnitors claim or assert that they had been released from the indemnity agreement until after the Bank failed.

Defendants in the first affirmative defense, paragraph III of the answer of Campbell and wife (T. of R. pg. 28), and in paragraph III of the answer of Mentzer and wife, and Eva Copping (T. of R. pg. 37), affirmatively allege, "That the term of office of the said Robert Marr as County Treasurer of Thurston County, Washington, expired and terminated under the laws of the State of Washington, on the 8th day of January, A. D. 1913, and the said depository bond, Exhibit "A", by its terms and conditions also expired and terminated on the said 8th day of January, A. D. 1913," and in paragraph VI of the Second affirmative defense in said answers (T. of R. pg. 30 & 41), affirmatively allege "That on or about the 29th day of May, A. D. 1914, one W. H. Britt, the duly elected, qualified and acting Treasurer of Thurston County, Washington, and successor of the said Robert Marr, former treasurer, fully released, cancelled and dis-

charged the said depository bond Exhibit "A" and fully released and relieved and discharged the plaintiff of all liability thereunder, and surrendered up and delivered the said bond to the plaintiff, and the defendant was thenceforth and thereafter and at all times since has been fully discharged and relieved of all liability thereon or responsibility thereunder."

Defendants hence are making no contention in regard to the payment of the second premium on June 22, 1912, which carried the life of the bond to June 22, 1913, and over the expiration of Marr's term as County Treasurer and into Britt's term for some five months. Defendants in the second affirmative defense admit that the bond ran until Britt gave the release on May 29, 1914, *thus admitting that the bond was not personal to Marr, but could be and was released by his successor, Britt, that it did not expire with Marr's term but was in force during Britt's term.* This defense is an admission that the renewals on June 22, 1912, and on June 22, 1913, were valid and continued the bond and the indemnity agreement in force.

When Marr went out of office he took a Demand Certificate for \$9,974.76 and turned this over to his successor, Britt, who opened his account with it with the Bank.

On June 22, 1913, and after Marr's term had expired and Britt had succeeded him as County Treasurer, which took place on June 8, 1913, a third annual premium was due in order to extend the bond for another year, or until June 22, 1914. The plaintiff billed the Bank for the premium which was paid, and the receipt with a letter from indemnitor Hays to Britt (T. of R. pg. 57) was filed with the County Clerk.

This letter to Treasurer Britt, dated June 13, 1913, written in behalf of the Bank and of the indemnitors and by one of them states that this premium payment *continues the bond in force for one year*. This letter became a public document and it must be presumed that the indemnitors who were the Bank officials had knowledge of it especially as in the indemnity agreement they had agreed to pay the premium and had agreed to keep the plaintiff indemnified. By this payment the Bank continued as a depository receiving County moneys, of which the indemnitors being practically the sole owners and in charge of the Bank's business, are charged with knowledge and of which they receive the benefit.

No new bond was taken but the original bond was continued in force to June 22, 1914. No new indemnity agreement was delivered but the indemnity agree-

ment given with the bond was still held by the plaintiff. The indemnitors did not then suggest that their indemnity agreement was terminated or that they should be released. They had agreed to keep the plaintiff indemnified and to be bound *until the plaintiff should have executed a release to them under its corporate seal and the signatures of its officers.*

There can be no question that in the minds of all parties the original bond was then continued and any loss to plaintiff was protected by the indemnity agreement. The indemnitors can not presume to have intended a breach of their agreement to keep the plaintiff indemnified, especially without in some manner notifying the plaintiff to that effect.

This we believe to be a complete answer to the first defense wherein it is claimed that the bond and indemnity agreement terminated with the expiration of Marr's term, January 8, 1913. After that date, to-wit, on June 22, 1913, the bond was certainly continued in force for the benefit of the indemnitors until June 22, 1914, and no other indemnity agreement was given nor was the indemnity agreement released, but was still in the hands of the plaintiff. By their own acts they continued plaintiff's liability on the bond and likewise continued their agreement to indemnify plaintiff.

The second defense, *which in fact negatives the first defense*, states that Treasurer Britt released the original bond on May 29, 1914, and thereby defendants became released from the indemnity agreement. While the release is dated May 29, 1914, yet it states it was not to be in effect until June 22, 1914, on which date the substituted bond would become operative.

The Court must now determine what actually took place just prior to June 22, 1914, the date to which the last premium had been paid. What did the parties intend in view of the stipulations contained in the indemnity agreement?

The Bank was still practically owned by defendants and under their exclusive control.

The indemnity agreement was based on a valid consideration. It recites that it is in consideration of the premises and of the sum of One Dollar, and in Section First the indemnitors agree to pay the premium annually, which is plaintiff's compensation for the *accommodation afforded them*. They were stockholders and officers and it was to their financial interest to keep the Bank a public depository. The situation on June 22, 1914, was the same as on June 22,

1913. Britt and not Marr was the County Treasurer at each time.

The original bond was continued with Britt's consent on June 22, 1913, by the indemnitors or the Bank simply paying the annual premium as the indemnitors in Section First had agreed to do. They planned to do the same thing on June 22, 1914, that is simply pay the annual premium which would continue the bond for another year. On May 22, 1914, the Bank sent plaintiff the annual premium to continue the bond for an additional year (Exhibit 4, T. of R. pg. 106), and in the letter accompanying the draft it was suggested that Britt had succeeded Marr as County Treasurer and if necessary, that an endorsement would be made to that effect, although the fact is that Britt had succeeded Marr on January 8, 1913, and one renewal had been made while he was in office.

On May 23, 1914, plaintiff sent the Bank a receipt for the premium continuing the bond for an additional year and stated that if Marr's term had expired and Britt had been elected to succeed him, a new bond should be sent and requested to be advised (Exhibit 3, T. of R. pg. 105).

On May 25, 1914, the Bank in answer, wrote the plaintiff as follows (Exhibit 5, T. of R. pg. 107):

"Geo. W. Allen & Co.,
Alaska Bldg.,
Seattle, Wash.

My Dear George:

Your favor of the 23rd inst. enclosing receipt for annual premium has been received and in connection therewith beg to state that Mr. W. H. Britt was elected to succeed Mr. Robert Marr at the election two years ago, hence I imagine that it is necessary for you to issue a new bond, which I trust you will do and forward to us, however, the same bond has been renewed once or twice since Mr. Britt assumed office.

Thanking you for your attention in this matter, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, President."

On May 28, 1914, the plaintiff sent a new bond, dated June 22, 1914, and a letter (Exhibit 6, T. of R. pg. 108), as follows:

"Mr. W. Dean Hays, Vice-President,
State Bank of Tenino,
Tenino, Wash.

My Dear Dean:

Acknowledging your esteemed favor of the 25th instant, we enclose herewith new bond duly executed in favor of W. H. Britt, County Treasurer of Thurston County, Washington, effective June 22d, 1914. We think it is best that a new bond be filed as of the anniversary date of the former bond, and we will therefore, require new application signed by your good institution, which kindly let us have, together with copy of your latest financial statement, by return mail. It will also be necessary that the enclosed

release be signed by the Treasurer covering the former bond, as the same by its terms is continuous, and we must have this release to enable our home office to relieve our account of future premiums.

Thanking you to let us have the application and release promptly, and with kindest regards, I remain,

Very truly yours,

GEO. W. ALLEN,
Manager."

This bond was delivered by the Bank to the Treasurer on May 29, 1914, with a letter (Exhibit 9, T. of R. pg. 111), as follows:

"Mr. W. H. Britt, Treas.,
Olympia, Washington.

My Dear Mr. Britt:

You will herewith please find Depository Bond of the National Surety Company of New York in your favor for \$5000.00 maturing June 22, 1915, to take *the place of* the one heretofore issued to Robert Marr as Treasurer.

You will also find two blank releases for the former bond which you will kindly sign and return to us.

Thanking you for your attention to this matter and trusting that you will find everything satisfactory, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays,
V. President."

At the time of receiving the new bond Treasurer Britt gave the Bank for the Surety Company a release of the original bond to be effective from and after June 22, 1914 (T. of R. pg. 116, Exhibit 11).

During these negotiations there was no suggestions that the indemnity agreement would become void. No one had any such intention. No new indemnity agreement was given. It would not be in keeping with their agreement to at all times keep plaintiff indemnified to claim the indemnity agreement was then terminated nor with their agreement to be bound until the plaintiff released them from the indemnity agreement.

The situation was in no manner changed. The defendants still wanted their Bank to be a public depository and qualified to receive County funds, the liability was still limited to \$5,000.00. The whole correspondence shows that plaintiff's liability continued uninterrupted and that one bond was substituted for the other.

It would certainly be unconscionable and unjust for the indemnitor to arrange for the plaintiff's liability to continue, they secretly intending that such continued liability would not be indemnified, especially in view of their agreement to pay the premium annually, and to at all times keep the plaintiff indemnified. The indemnitors did not ask for nor did plaintiff give them a release.

No one ever contemplated that the indemnitors

were released, and they made no such claim until after the Bank failed and they were called upon to pay. Certainly the purpose of the release clause in the agreement could have been for no other reason. If the plaintiff desired the indemnity agreement in the first place it had the right to rely upon it fully. They received the benefit of the substituted bond from June 22, 1914, and their Bank continued as a public depository receiving County moneys.

In their indemnity agreement, Section Fifth, they stipulated that no action of the plaintiff in extending the bond should in any wise affect the liability on the indemnity agreement or release them therefrom; that the plaintiff could change, modify, and extend the bond, could renew the same or give a new obligation in its place without notice to them and they would be liable to plaintiff as fully and to the same extent on account of such changed, modified or extended instrument or such renewals thereof of other or new obligations in place thereof, *whenever and as often as made* as fully as if such instrument was described at length in the indemnity agreement they were then executing (T. of R. pg. 101).

Section Four of the indemnity agreement provides for plaintiff's taking steps to procure its release from

liability on any instrument within the meaning of Section Fifth (T. of R. pg. 100).

Section Eighth provides that the covenants in the indemnity agreement should be available to plaintiff as well concerning any subsequent bonds executed for them or *at the instance of any of them* as concerning this original bond.

This new or substituted bond was executed on the request of Hays, who was one of them and was signed by Blumauer as President, and Hays as Cashier, both of whom were indemnitors and defendants in this action (Exhibit 10, T. of R. pg. 112).

The trial Court seems to have decided this case as though the suit was on the bond. This suit is on the indemnity agreement and the bonds were put in evidence to prove the plaintiff's legal liability by reason of which it paid the County.

The question to be determined is whether the indemnity agreement was still in force and whether it indemnified the plaintiff against this loss. Did these indemnitors who were stockholders and officers of the Bank, in their indemnity agreement intend to cover, and did they in fact cover renewals and substituted bonds? They said so in the most positive terms. After stipulating for renewals and substitutions they said

“we and each of us shall be liable to the Company as fully and to the same extent on account of any such renewals thereof or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein.”

How the trial Court could express a doubt as to the right to make more than one renewal is difficult to determine in view of the language “any such renewals” and “whenever and as often as made.” It seems clear that all the renewals carried with them the continued liability of the indemnitors. Did the indemnitors in their indemnity agreement cover new or substituted bonds in place of the original? That is, did the indemnity agreement cover such a transaction as occurred on June 22, 1914? What, in fact, was this transaction? It would seem to be plain from the correspondence.

These indemnitors agreed to pay an annual premium. This premium was actually sent and paid for continuing the original bond and in performance of their covenants to pay the annual premium. The plaintiff sent a receipt for the premium. It was after this that it was thought best to substitute a new bond for the original bond and a new bond was sent in the same amount but no new premium paid.

The Bank, acting through indemnitor Hays, delivered this bond to the County Treasurer *to take the place of the former bond issued to Marr* ("in lieu of") as Treasurer, and requested Treasurer Britt to release the former bond (Exhibit 9, T. of R. pg. 111). Britt, though the former bond ran to Marr as Treasurer, released it to be effective June 22, 1914, when the new bond which took its place was dated. No other premium was paid by the indemnitors but the premium sent by the Bank, acting through indemnitor Hays, to continue the original bond paid for this renewal of the substituted bond.

When all technicalities and verbiage are brushed aside, the parties simply substituted a new bond running to Britt as County Treasurer, successor to Marr, in place of the bond that ran to Marr as Treasurer. Plaintiff was not released of liability but its liability continued as theretofore and was indemnified by the indemnity agreement. *It was in fact the extension of the liability for an additional year.* This was clearly covered by the express covenants in the indemnity agreement. The indemnitors agreed to be bound by any extensions or substitutions of the bond, that the Company could execute renewals or other or new obligations in the place of the bond without notice to them and they were to be liable to the Company on

account of any such renewals or other or new obligations given in place of the bond *whenever and as often made* as fully as if such new obligation was described at length in the indemnity agreement.

~~This bond~~
~~Thus bond~~ took the place of the former. Both bonds were not in force at the same time but on the expiration and release of the original bond the substituted bond became operative. It was not added to but was given in the place or in lieu of the former bond.

Language could not be plainer. The whole correspondence shows it. On May 22, 1914, the Bank, acting through indemnitor Hays, sends the annual premium and states it is in payment for *renewal* of the depository bond."

On May 23, 1914, the Bank, acting through indemnitor Hays, writes the plaintiff acknowledging receiving receipt for the *annual premium*.

On May 26, 1914, Treasurer Britt acknowledges receipt of the *Renewal Certificate*, and suggests it would be much better to have a new bond running to him as County Treasurer as the old bond ran to Marr as County Treasurer.

On May 29, 1914, the Bank, acting through indemnitor Hays, delivered the new bond and wrote

Treasurer Britt that it is "*to take the place of the one heretofore issued to Robert Marr as Treasurer*" and enclosed blank release of the original bond to be signed and returned. The new bond was executed by the Bank, acting through indemnitors Blumauer and Hays.

Surely the trial Court was not justified in holding as a matter of law that the new bond did not and was not intended to take the place or be in lieu of the original bond. As this evidence was not disputed the trial Court should have held as a matter of law the exact contrary, or at least, should have submitted this matter to the jury under proper instructions.

The indemnitors covenanted for renewals, for changes, for extensions, and for the substitution of other or new obligations in place or in lieu of the original bond and that they would be bound until the plaintiff should execute a release under its seal and the signature of its proper officers.

No release had ever been given or asked by the indemnitors but with their knowledge, or at least the knowledge of Hays and Blumauer, a renewal or extension by means of another and new obligation had been given and the indemnity agreement left unreleased and with the plaintiff in full force and effect.

AUTHORITIES.

The indemnitors are compensated sureties or guarantors. The indemnity agreement recites that they have requested the plaintiff to sign the bond, that it is in consideration of the premises and One Dollar, and that they will pay the premium annually as compensation to the plaintiff for the accommodation afforded them by the plaintiff in executing the bond. The evidence shows that at the time and during all the transactions the indemnitors owned all but 12 shares of the capital stock of the Bank.

The rule of strict construction, if there were room for construing the indemnity agreement, does not apply. It must be remembered that the indemnitors were not voluntary sureties.

Cowles vs. U. S. T. & G. Co., 32 Wash. pg. 120 (Opin. pg. 125).

Costello vs. Bridges, 81 Wash. pg. 192 (Opin. pg. 204).

Mamerow vs. National Lead Co., 99 Am. St. Reps. pg. 196.

The indemnity was a continuing one as long as the plaintiff was obligated for the deposits of County moneys in the Bank whether by reason of the original bond or any extended, renewed, altered, changed, modi-

fied or amended bonds or other or new obligations in place thereof.

Lowe vs. Beckwith, 58 Am. Dec. pg. 659.

Gates vs. McKee, 64 Am. Dec. pg. 545.

Michigan State Bank vs. Peck, 65 Am. Dec. pg. 234.

First Commercial Bank vs. Talbert, 50 Am. St. Reps. pg. 385.

Strawbridge vs. Baltimore Ry. Company, 74 Am. Dec. pg. 541.

Anderson vs. Langdon, 4th L. Ed. (U. S.) pg. 42.

The bond which the indemnity agreement was executed to secure, was solely for the benefit of the County Company, whether deposits were made by Treasurer Marr or his successor in office, and the indemnitors agreed that such bond could be changed, extended, renewed or a new bond given. This bond was extended or renewed on June 22, 1912, for one year or until June 22, 1913. Marr as Treasurer was succeeded by Britt as Treasurer on January 8, 1913. If the Bank had failed in February, 1913, surely the County, through Britt, its then Treasurer and successor to Marr, could have held the plaintiff and the plaintiff could have held the indemnitors.

The same bond was again extended or renewed on June 22, 1913, for one year or until June 22, 1914,

and certainly a failure of the Bank during that period would obligate the plaintiff to respond on the bond and the indemnitors to respond to plaintiff. If it could be extended or renewed, certainly a new bond could be furnished in its place for to this the indemnitors had agreed.

John Tyler, etc., vs. John H. Hand, et al., 12
L. Ed. (U. S.) page 824.

In the above case the bond ran to Martin Van Buren, President of the United States, and his successor in office. It was held that President Tyler could sue on the bond.

The bond in the case at bar was given in order to comply with the statute so that the Bank, practically owned by the indemnitors, could be a depository of county funds. While it did not in express terms run to Marr's successor in office, yet the application for the bond designated the obligee to be the Treasurer of Thurston County. The indemnity agreement nowhere mentions Marr by name but recites that the signers have requested plaintiff to execute a \$5,000.00 bond in favor of the *Treasurer of Thurston County* and they agree to pay an annual premium until plaintiff should be discharged from liability and that they would be bound on any extensions or renewals or other

new bond as though the same were set forth in the agreement. The renewal or new bond is as much for their interest as the original bond for they, as owners of the Bank, would receive the benefit of having the Bank continue as a depository of County funds.

U. S. vs. Bailey, 178 Fed. pg. 302.

In the above case a bond binding the Principal and Surety and their successors and assigns was sued upon to recover damages caused by the receiver of the principal in the bond and recovery was allowed.

American Surety Co. vs. Campbell, 138 Fed. Rep. pg. 531.

In the above case suit by the corporation after the termination of receivership on a bond given to the receiver his successors and assigns was maintained.

The purpose of the bond was to constitute the Bank a depository of County funds and to secure to the County a return of deposits made by its Treasurer and this was secured to the plaintiff by the indemnity agreement.

The personnel of the County Treasurer was of no concern to the indemnitors. It was not the Treasurer's honesty or faithfulness that they were insuring the plaintiff against but the honesty, faithfulness and financial ability of their Bank, an institution that

they owned and managed. It would be the same money, that is County money, whether deposited in the Bank by Marr as Treasurer, or by Britt as Treasurer. The Bank, or in fact the indemnitors as owners and managers of the Bank, would handle it and be responsible to the County no matter what might be the name of the Treasurer who made the deposits.

They were indemnifying the plaintiff against their own institution and not against the Treasurer, be he Marr or Britt.

There can be no question but that this was what was intended and was the interpretation placed upon the transaction as is conclusively shown by the subsequent renewals and the correspondence that took place at the time the substituted bond was filed. The personnel of the owners and officers of the Bank for whose acts the indemnity agreement was given was at no time changed.

If they were willing to indemnify against loss in their Bank of the deposits by Marr as County Treasurer, there was not and could not be any reason for not indemnifying against loss in the same Bank of the deposits by Britt as County Treasurer, especially in view of the fact that they agreed to pay an annual premium until the plaintiff was released, to at all times

keep plaintiff indemnified, and be bound for any renewals or substitutions until plaintiff released them.

The successor in office of a sheriff may sell under a levy made by a former sheriff.

Lewis vs. Bartlett, 12 Wash. pg. 212.

This bond was given to a County official pursuant to the statute regarding depositaries and inures to his successors.

State vs. Peterson, 114 N. W. pg. 828.

Faurot vs. State, 11 N. E. pg. 472.

Murfree on Official Bonds, paragraph 38.

The County was the real party for whose benefit the bond was taken, and could have maintained an action in its own name.

People vs. Bankers' Surety Co., 122 N. W. pg. 350.

Placer County vs. Dickerson, 45 Cal. pg. 12.

Buhrer vs. Baldwin, 100 N. W. pg. 468.

Board of Commissioners vs. Bank, 77 N. W. pg. 815.

State vs. Foster, 38 Pac. pg. 926.

McClure vs. County Commissioners, 19 Cal. pg. 122.

State vs. McFetridge, 20 L. R. A. pg. 223.

Jarboe vs. Shirely, 59 S. W. pg. 328.

This was a community liability to the plaintiff and the wives are proper parties. This point was not raised by defendants in trial court.

Horton vs. Donohoe Kelly Banking Co., 15 Wash. pg. 399.

Way vs. Lyric Theatre Company, 79 Wash. 275.

This action, as already stated, is on the indemnity agreement and it is this instrument that must be construed. The indemnitors having agreed that the bond could be without notice to them, altered, amended, modified, changed, extended, renewed, or a new bond given in its place, the sole question to be decided is whether the extensions and renewals and the substitution of the new bond were within the terms of the agreement as contemplated at the time by the plaintiff and the indemnitors.

The indemnitors were almost the entire owners of the Bank and with full control of its business. They knew that the bond as written was for one year for which they paid a year's premium and agreed to annually pay such premium on June 22nd, of each year during plaintiff's liability on the bond or on any extension, renewal or new bond given in its place. They wanted their Bank to be a depository of County funds not for one year but continuously. They knew,

as owners of almost all the capital stock, that they could continue in control of the Bank. They knew when the bond was given that under the statute, Marr's term would expire on January 8, 1913 (Rem. & Bal. Code, Sec. 3860-3937).

What did the indemnitors intend by their agreement that the bond could be changed, altered, extended and renewed and a new bond substituted whenever and as often as made?

They could cease to be a depository, cancel the bond and not pay a renewal premium at any time as they had full control of the Bank. It was no concern to them or any change or increase of liability, whether Marr or his successor made deposits. It was not against Marr's acts or those of his successor that they were indemnifying the plaintiff, but against the acts of their own Bank. The personnel of the County Treasurer was in no way material, nor did it enter into the transaction which induced them to indemnify plaintiff against the acts of their Bank in accepting the County deposits, whether made by Marr or his successor.

The entire transaction, correspondence and relation of the indemnitors to the Bank show, it seems

to us conclusively, that just such a course as was pursued was contemplated and agreed to.

They, as indemnitors and officers of the Bank, knew that their indemnity agreement had not been released but was, during all such renewals and the substitution of the new bond, still held by the plaintiff, they having agreed to at all times keep plaintiff indemnified and to be bound until the plaintiff gave them a written release under its corporate seal and the signature of its officers. When the circumstances of the parties and the ends desired to be accomplished are given full consideration, it seems conclusive to us that such renewals and substitution as took place were intended to be and were covered by the stipulations in the indemnity agreement.

Plaintiff acting in good faith, relying upon its indemnity agreement, the indemnitors having received the benefit of the renewals and the substituted bond in having their Bank continued as a depository of County moneys, knowing that no new indemnity agreement had been given, that their agreement had not been released but was still held by plaintiff.

After the Bank failed and plaintiff was required to pay deposits procured by defendants by reason of the plaintiff's bond, it is too late for defendants to

claim that plaintiff is not protected by their indemnity agreement and has not been kept indemnified, as they had agreed to do, they having received the benefit and having made no such claim when such renewals were made and said substituted bond given.

We submit that the trial Court committed error in taking the case from the jury and dismissing the action.

We respectfully request that this Court reverse the judgment and direct the trial Court to enter a judgment in favor of plaintiff and against the defendants for \$4,327.88 with 6% per annum interest thereon from December 30, 1914 (less \$855.83 paid as dividend by the receiver on April 21st, 1915), together with \$14.00 as expenses in investigating liability, with costs to plaintiff, or if such judgment is not proper then that the District Court be directed to grant a new trial and proceed with the action.

Respectfully submitted,

C. B. WHITE, Seattle, Wash,

JOHN D. FLETCHER,

ROBERT E. EVANS, Tacoma, Wash.,

Attorneys for Plaintiff in Error.

IN THE
**United States Circuit Court
of Appeals**

For the Ninth Judicial Circuit.

NATIONAL SURETY COMPANY, a corporation,

Plaintiff in Error,

VS.

ISAAC BLUMAUER, W. DEAN HAYS, and
ORA J. HAYS, his wife, T. F. MENTZER
and ELIZABETH E. MENTZER, his wife,
A. D. CAMPBELL and JESSIE E. CAMP-
BELL, his wife, DAVID COPPING and
EVA COPPING, his wife,

Defendants in Error.

*Upon Writ of Error to the United States District
Court of the Western District of Wash-
ington, Southern Division.*

BRIEF OF DEFENDANTS IN ERROR

CHARLES O. BATES,
CHARLES T. PETERSON,
Tacoma, Washington.

PRESTON M. TROY,

ROBERT F. STURDEVANT,
Olympia, Washington,

Attorneys for Defendants in Error.

No. 2967

IN THE
United States Circuit Court
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For the Ninth Judicial Circuit.

NATIONAL SURETY COMPANY, a corporation,

Plaintiff in Error,

VS.

ISAAC BLUMAUER, W. DEAN HAYS, and
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Defendants in Error.

*Upon Writ of Error to the United States District
Court of the Western District of Wash-
ington, Southern Division.*

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

The facts as stated by plaintiff in error are substantially correct. The statement is not complete, however, and avoids, we think, the features of the case which controlled the decision of the Court below, and which in our opinion must con-

trol the decision here. The statement includes many matters which in our opinion were not considered by the Court below, and which we think will not be considered here.

The Court will bear in mind at the outset that plaintiff's action is based solely on instruments in writing, unaided by any acts *in pais* of the parties, or estoppel. In view of the statement as made by the plaintiff in error it is proper that we call attention to the issues as made by the pleadings.

THE PLEADINGS

It is alleged in the complaint, and admitted in the answer, that on the 22nd day of June, 1911, the State Bank of Tenino, executed its bond to Robert Marr, as Treasurer of Thurston County, Washington, which for the convenience of the Court we will print in full, as follows:

(We will italicize the portions of this bond which plaintiff in error did not refer to or set forth in its brief.)

“KNOW ALL MEN BY THESE PRESENTS, That we, THE STATE BANK OF TENINO, of Tenino, Washington, as principal, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto Robert Marr, individually and as Treasurer of the County of vidually and as County Treasurer of the County of Thurston, State of Washington,

in the full and just sum of Five Thousand (\$5,000.00) Dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and surety respectively bind themselves, their and each of their successors and assigns, jointly and severally firmly by these presents.

SIGNED, SEALED AND DELIVERED at Seattle, Washington, this 22nd day of June, A. D. 1911.

THE CONDITION OF THIS OBLIGATION IS SUCH, that, whereas the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such treasurer, at the special instance and request of the said State Bank of Tenino, has deposited, or may hereafter, from time to time, deposit and place in charge of the said principal hereinbefore named, certain moneys, checks, etc., for the custody or for the proceeds of the face value of which the said treasurer, as such, may be responsible, and

NOW, THEREFORE, if the said principal hereinbefore named shall in due and ordinary course of business, promptly pay to the said treasurer upon demand and presentation of proper and valid checks therefor, in the usual and ordinary hours of business, all moneys and proceeds of all checks, etc., which have been or shall hereafter be deposited with, trans-

ferred to or placed in charge of the said principal, by or on behalf of the said treasurer, and shall keep and hold harmless the above named Robert Marr, individually, and as such treasurer, from all liability, loss and damage which may arise, or accrue against the said treasurer by reason of the deposit or delivery of said funds, checks, etc., or any part thereof as aforesaid, and shall well and truly fulfill and perform any and every duty and obligation arising out of or connected with the deposit or delivery of funds, as aforesaid, by and on behalf of said treasurer, then this obligation to be void; otherwise to be and remain in full force and effect.

PROVIDED, HOWEVER, upon the further following express conditions:

FIRST: That in the event of any default on the part of the principal, written notice thereof with a verified statement of the facts showing such default, and the date thereof, shall within ten (10) days after the knowledge of such default, has been received by the said Robert Marr, or his representatives, be mailed to the surety at its office in New York City.

SECOND: That the surety shall not be liable for any deposits made after any such default shall have come to the knowledge of said Robert Marr or his representatives.

THIRD: *That the said surety shall not be liable hereunder except for the loss of moneys*

belonging to the said Robert Marr, treasurer, and which shall have been deposited with the aforesaid principal by the said Robert Marr, as treasurer aforesaid, or to his credit as such treasurer.

FOURTH: That no such suit, action or proceeding shall be brought or instituted against the surety upon, or by reason of any default, of the principal after the expiration of sixty (60) days after such default, or in any event, after the 22nd day of June, 1912.

FIFTH: That the surety shall have the right to terminate its suretyship under this obligation by serving notice of its election so to do upon said 'obligee' or his or its lawful representatives, and thereupon the said surety shall be discharged from any and all liability hereunder for any default of the principal after the expiration of thirty days after the service of such notice.

SIXTH That, if the obligee shall at any time hold concurrently with this bond, or represent to the surety, in any statement to it, that it does or will at any time hold concurrently with this bond, or any other bond or collateral as guarantee of security from or on behalf of the principal, the obligee shall be entitled, in event of loss as hereinbefore stated, to claim hereunder only such proportion of the loss as the penalty of this bond bears to the sum of the penalties of all bonds and amount of col-

lateral carried, or to be carried on the principal's behalf, and in no event shall the surety be liable for any sum in excess of the penalty of this bond."

(Record, pp. 10-12.)

And to indemnify plaintiff against loss because of its executing such depository bond, defendants executed to it their indemnity bond, as follows:

(We have italicized the portions of the depository bond not set forth, or referred to by plaintiff in error in its brief).

"THIS AGREEMENT WITNESSETH :
That Whereas, we the undersigned have requested the NATIONAL SURETY COMPANY, a corporation under the laws of the State of New York (hereinafter called the Company), to sign and execute a certain bond or undertaking in the penalty of Five Thousand Dollars (\$5,000.00) in behalf of the State Bank of Tenino in favor of the Treasurer of Thurston County, Washington, effective June 22, 1911, covering deposits of the said Treasurer, in said bank, *reference to which bond or undertaking made for the purpose of certainty and a copy of which instrument is or may be hereto attached; and*

WHEREAS, The Company has signed and executed, or is about to sign and execute the said instrument upon condition of the execution

hereof and upon the security and indemnity hereby and herein provided,

NOW THEREFORE, In consideration of the premises of the sum of One Dollar in hand paid to us by the Company, the receipt whereof is hereby acknowledged, we, the undersigned, hereby covenant and agree with the Company, its successors and assigns, in manner following:

FIRST: That we *will in* cash to the Company as its principal in the City of New York, or to such agent or representative of the Company as the Company may in writing designate, the sum of Twenty-five and no |100 (\$25.00) Dollars, which is agreed by the undersigned to be the Company's compensation for the accommodation afforded the undersigned by the execution of said instrument by the Company, said sum to be paid to the Copmany annually in advance on the Twenty-second day of June in each and every year during the time the Company shall be and continue liable upon said instrument, and until the Company shall have been fully discharged and released from any and all liability upon the said instrument, and all matters arising therefrom, and until there shall have been furnished to the Company, at its principal offices in the City of New York, due and satisfactory proof by evidence legally competent, of such discharge and release.

SECOND: That we will at all times indemnify the Company, and hold and save it harmless from and against any and all demands, liabilities, loss, damage or expense of whatsoever kind or nature, including counsel and attorney's fees, which it shall at any time sustain or incur by reason, or in consequence of having executed the said instrument and that whenever any claim or claims shall have been made upon the Company under the said instrument, if in the judgment of the Company it is determined that such claim or claims should be paid, we covenant, promise and agree to pay over in cash to the Company upon its demand therefor, the amount or amounts of such claim or claims, and if the Company deny liability concerning any claim or claims and suit or suits be brought against the Company, under said instrument to recover the amount of said claim or claims, or any other proceeding be taken thereon involving the Company, whether the suits and proceedings be against the principal named in the said instrument, and the Company jointly, or against the Company alone, we covenant and agree to defend said suits and proceedings to a conclusion at our own expense or to permit the Company, if it so elect, to place the defense of such suits and proceedings in the hands of its own attorneys or counsel, in which latter event we covenant, promise and agree to pay

over to the Company upon its demand such sum or sums of money and to defray the expenses of conducting the defense of said suits and proceedings; and further we covenant and agree to satisfy and discharge any and all judgements recovered against the Company under said instrument as soon as the same shall be entered or docketed unless an appeal be taken and bond or bonds to secure or stay the collection of such judgment or judgments be procured by the undersigned and filed as required by law, and if final judgment be recovered or entered against the Company after the decision of such appeal, we covenant and agree to forthwith satisfy and discharge every such final judgment without requiring the Company to take any steps whatsoever thereon; and should judgment be entered against the principal in said bond and the Company, or against the Company alone, in either event, should the undersigned not procure an appeal to be taken and furnish bond or bonds to secure, supersede or stay the collection of such judgment, the Company may, if it elect, pay said judgment, whereupon we agree forthwith to repay the Company the amount of said judgment so paid, together with legal interest thereon from the date of payment to the date of such re-payment; that we will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts

of money not hereinbefore provided for, which the Company or its representatives shall pay, or cause to be paid, or become liable to pay under its obligations upon said instrument, or as charges and expenses of whatsoever kind or nature, including counsel and attorney's fees by reason of the execution thereof, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the Company as soon as it shall have become liable therefor, whether it shall have paid out said amount or any part thereof, or not.

That in any settlement between us and the Company the vouchers or other proper evidence showing payment by the Company of any such liability, loss, damage, or expense, shall be prima facie evidence against us of the fact and amount of our liability to the Company, provided that such payment shall have been made by the Company in good faith, believing that it was liable therefor.

THIRD: That in case of any action at law, suit in equity, or other proceeding be commenced or notice of such action, suit or proceeding be served upon the undersigned, affecting the liability of the Company upon said instrument, or growing out of any matter connected herewith, or on account of which the said instrument was given we will immediately

notify the Company at its principal offices in the City of New York.

FOURTH: The Company may at any time hereafter take such steps as it may deem necessary or proper to obtain its release from any and all liability under said instrument, or under any other instrument within the meaning of Section Fifth hereof, and to secure and further indemnity itself against loss, and all damages and expenses which the Company may sustain or incur or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by us.

FIFTH: That no act or omission of the Company in notifying, amending, limiting or extending the instrument so executed by the Company shall in any wise effect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof, or other and new obligations in its place or in lieu thereof, and without notice to us being expressly waived, and in any such case, we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, limited or extended instrument or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as

fully as if such instrument were described at length herein.

SIXTH: That it shall not be necessary for the Company to give us or either of us, notice of any act, fact, or information coming to the notice or knowledge of the Company concerning or affecting its rights or liability under any such instrument by it so executed, or our rights or liabilities hereunder, notice of all such being hereby expressly waived.

SEVENTH: That this agreement shall bond not only the undersigned jointly and severally, but also our respective heirs, executors, administrators, successors and assigns (as the case may be), until the Company shall have executed a release under its corporate seal, attested by the signature of its officers proper for the purpose.

EIGHTH: That these covenants as also all collateral securities or indemnity, if any, at any time deposited with or available to the Company concerning any bond or undertaking executed for or at the instance of us, or any of us, at the option of the Company, be available in its behalf and for its benefit and relief as well concerning any or all former and subsequent bonds or undertakings executed by us, or at the instance of us, or any of us, as concerning the bond or undertaking such covenants, collateral securities or indemnity shall have been made, deposited or given.

NINTH: It is distinctly covenanted and agreed that it is true and intent meaning of the provisions of this instrument among other things, that immediately upon any default on the part of the principal in said bond in performing any of the obligations thereof, or immediately upon any claim being made upon the Company, the undersigned shall pay over to and deposit with the Company in cash, the full amount of moneys or the equivalent thereof, with accrued interest, if any, alleged by the holder of said bond to be in the hands of said principal or the penalty of said bond.

IN WITNESS WHEREOF, We have hereunto set our hands and affixed our seals this 22nd day of June, 1911."

(Record, pp. 13-19.)

On June 22, 1914, and without taking any further, other or additional indemnity from defendants, plaintiff in error executed a new depository bond to W. H. Britt, then Treasurer of Thurston County, Washington, as follows:

"KNOW ALL MEN BY THESE PRESENTS, That the State Bank of Tenino as Principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business in the State of Washington, as surety, are firmly held and bound unto W. H. Britt, Treasurer of the

County of Thurston, State of Washington, in the sum of Five Thousand and no 100 Dollars (\$5,000.00), for the payment of which, well and truly to be made we hereby bind ourselves, our and each of our successors and assigns, jointly, firmly by these presents.

Dated this 22nd day of June, A. D. 1914.

WHEREAS, the said Principal, State Bank of Tenino, has been designated by W. H. Britt, Treasurer of Thurston County, as a depository of the current funds in the hands or possession of the said Treasurer, W. H. Britt, to be deposited in the said Bank; the amount whereof shall be subject to withdrawals, or diminution by said Treasurer, as the requirements of said County shall demand, and which amount may be increased or decreased as the said Treasurer may determine and

WHEREAS, the said Bank, in consideration of such deposit and of the privilege of keeping same, has agreed to pay the County of Thurston, State of Washington, interest on said sum upon the average daily balance the said Bank shall have on deposit for the month, or any fraction thereof next preceding the crediting of said interest, which interest shall be computed and credited to the account of W. H. Britt, Treasurer of said County of Thurston, State of Washington, and shall become thenceforth a part of such deposit.

This provision is not contained in first bond.

NOW, THEREFORE, if the said State Bank of Tenino shall at the beginning of every month render to the Treasurer of the County of Thurston, State of Washington, a statement showing the daily balance of such County moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all such sums of money so deposited, or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of W. H. Britt, Treasurer as aforesaid, and shall pay over the same or any part thereof, upon the check or written demand of said Treasurer, or to his successor in office, and shall calculate, credit and pay such interest, as aforesaid, and shall in all respects save and keep the said County, and the County Treasurer of the said County, harmless and indemnified for and by reason of the making of said deposit or deposits, and shall in all respects comply with House Bill No. 90, entitled, 'An Act regulating the keeping and deposit of public funds in Banks by the several Treasurers of the State of Washington,' passed by the Legislature of the State of Washington at its tenth regular session, in the year 1907, then this obligation shall be void and of no effect, otherwise to be and remain in full force and effect.

PROVIDED:

1. That the National Surety Company, Surety on said bond, shall have the right to terminate its liability under this obligation by serving notice of its election so to do upon the said Treasurer, and the said Surety shall be discharged from any and all liability hereunder for any default of the said State Bank of Tenino, Principal occurring after the expiration of thirty (30) days after the service of such notice.

2. The Surety shall only be liable for such proportion of the total loss or damage sustained by said Obligee, by reason of any default of the Principal embraced within the terms of this bond, as the penalty of this bond shall bear to the total sum of all bonds and securities which may be given to secure the deposits above referred to, and in no event shall the Surety hereunder be liable for any sum in excess of the penalty of this bond."

(Record, pp. 21-23.)

And received a release in writing of the first depository bond executed by it. It was after the first bond had been released and while this second depository bond was in force, and during the month of September, 1914, that W. H. Britt, as Treasurer of Thurston County, Washington, suffered a loss of moneys deposited under its protection in the State Bank of Tenino, and upon a demand being

made by Britt as such Treasurer on plaintiff under the terms of the last depository bond, plaintiff paid a proportion of the loss amounting to \$4,327.87, to recover which it brought this action against defendants under their indemnity agreement given in connection with the first depository bond, given by the Bank to Marr as County Treasurer. The complaint being a straight declaration upon the written instruments themselves.

(Amended Complaint, Record, pp. 3-9.)

The defendants, Blumauer and Hays and wife (Blumauer being President, and Hays Vice-President and Cashier of the defunct State Bank of Tenino), defaulted, the other defendants answered putting in issue the material allegations of the complaint and pleading affirmatively as a first affirmative defense that Robert Marr, was on June 22, 1911, Treasurer of Thurston County, Washington, and that the State Bank of Tenino was a depository of certain funds belonging to him as such Treasurer, and that plaintiff in error executed its certain depository bond on that date. That the term of office of Robert Marr terminated on the 8th day of January, 1913, and that by its terms and conditions said bond terminated and expired on that day. That defendants executed their certain indemnity bond to plaintiff in error to indemnify it against loss by reason of its having executed said depository bond to Marr as such Treasurer. Further alleges that the State Bank of Tenino upon demand and pre-

sentation of proper and valid checks paid all moneys deposited therein by said Marr as such Treasurer, and in all respects complied with the conditions of the bond as provided by its terms.

Defendants for a second affirmative defense set forth substantially the same facts, and pleaded in addition thereto a written release, which was not set forth in the answer, but which was introduced in evidence, and is, as follows:

“National Surety Company,
New York.

Gentlemen:

As surety on that certain depository bond, dated June 22, 1911, in behalf of The State Bank of Tenino, in favor of Robert Marr, Treasurer, Thurston County, Washington, in the penalty of \$5,000.00, you are released from further liability thereunder, from and after the 22nd day of June, 1914.

W. H. BRITT,

Treasurer, Thurston County, Wn.”

(Release, Record, p. 116.)

(Amended Answer, Record, pp. 32-42.)

The reply is a simple denial of the allegations of the amended answers.

(Reply, Record, pp. 43-46.)

THE FACTS.

The Court will bear in mind that there is no claim in the pleadings that defendants in error here

placed such a construction, or any construction, on the indemnity agreement as to cause it to extend to any other depository bond than that executed on June 22, 1911. There is nothing in the evidence whatever to show that plaintiff in error acted upon the assumption of anything outside of the terms of the written indemnity itself, and there is no claim in the pleadings and no fact established by the evidence that the indemnitors here, Campbell, Mentzer and Copping, or either of them, ever did one act or thing that might be construed as persuading plaintiff in error that they so regarded their indemnity agreement. There is absolutely no evidence that they, or either of them, made any representations to the plaintiff in error that could in any manner have led it to believe that they intended their indemnity agreement to cover the second depository bond, the one under which plaintiff suffered its loss. None of the defendants in error ever at any time communicated with plaintiff in error or with either or any of the County Treasurers; neither did any of them have any interview with any person representing plaintiff in error. In fact none of them ever saw or spoke to any officer or agent of plaintiff in error as to any transaction in connection with the depository bonds of the State Bank of Tenino, except when plaintiff in error obtained its indemnity agreement in the first instance in connection with the first depository bond to Robert Marr as Treasurer.

Plaintiff in error has in its statement of the case

adroitly set forth certain correspondence between the agents of the bonding company and the State Bank of Tenino, and the Bank and the bonding company. We can hardly understand its purpose in doing this, as there is no evidence in the record that the contents of this correspondence, or any part of it, was ever known to any of the defendants. Defendants in error made seasonable objections to the introduction of all of this evidence as shown by the record.

(Record, pp. 53-81.)

ARGUMENT.

As stated in the beginning plaintiff in error endeavors to make much of the written correspondence between the bank, the bonding company and W. H. Britt, as County Treasurer, and really argues its case on the theory that defendants in error here are liable on the grounds of an estoppel *in pais*.

(See Plaintiff's Brief, pp. 33-36-41-42.)

Despite the fact that there is not one scintilla of evidence to show that any of the defendants in error here had anything to do with said correspondence, or knew of its existence. If as a matter of fact some of the defendants were officers of the bank, and plaintiff claims that such relationship in any wise affected their liability under the indemnity agreement, it must be by acts on their part constituting an estoppel, and to avail itself of this plaintiff would have to specially plead it.

It is elementary that estoppel *in pais* means matters of fact as distinguished from matters of record, or conventional writing, or rather includes all forms of estoppel not arising from a record, from a deed, or from a written contract (16 Cyc. 681, and cases cited). The action here, as has been pointed out, is strictly upon a written contract, and not upon estoppel *in pais*, nor is such estoppel nor anything *de hors* a written contract alleged.

It is equally as elementary that when reliance is placed upon the elements of estoppel rather than a written contract, or, in conjunction with a written contract for that matter, the estoppel must be specially pleaded.

16 Cyc. 808, and cases cited.

Walker vs. Baxter, 6 Wash. 244.

Jacobs vs. Puyallup First Nat. Bank, 15 Wash. 358.

32 Cyc. 77.

Welsh vs. Seymour, 28 Conn. 387.

In that case the president of a corporation gave a bond conditioned for the faithful performance of his duties, which bond was signed by certain of the directors of the corporation whose duty it was to see that a proper bond was given. The Court held that insofar as the liability of those directors signing as sureties was concerned it depended upon the strict letter of their contract independent of the

consideration that they were directors and stockholders of the corporation.

In view of the state of the pleadings in this case and the evidence, all of the correspondence passing between plaintiff in error, the State Bank of Tenino, and W. H. Britt, as County Treasurer, is immaterial. We will therefore not devote any further space to those matters, but will proceed, as did the trial court, and as we think this Court must, on the theory that the liability, if any, of the defendants in error here is measured by the letter of their contract alone.

It is elementary that the relation of banker and depositor is that of debtor and creditor. It was the creation of that relationship between Robert Marr, as Treasurer of Thurston county, Washington, and the State Bank of Tenino, which gave rise to the agreement out of which this action arises.

Permit us here to briefly indulge in a homely illustration of the situation:

The State Bank of Tenino said to the National Surety Company, we want to get Five Thousand Dollars from Robert Marr, Treasurer of Thurston County, Washington, and we want you to go good for that amount. The National Surety Company said to the State Bank of Tenino, all right, we will do that, providing you indemnify us against loss under the surety agreement which we give to the State Bank of Tenino. In other words, we will give

you a letter of credit addressed to Robert Marr, County Treasurer of Thurston County, Washintgon, by which you may obtain credit of him in the sum of Five Thousand Dollars, for the payment of which we will stand sponsor. This was communicated to the indemnitors and they in turn said to the National Surety Company, all right, you give the letter of credit to the bank, and if you suffer any loss by reason of doing so we will make such loss good to you.

Now, let us see what the National Surety Company agreed to do, and in the doing of which defendants agreed to indemnify it. The bond executed June 22nd, 1911 (Exhibit "A," Record, p. 10, omitting formal parts), provides that the National Surety Company is "held and firmly bound unto Robert Marr, individually and as County Treasurer of the County of Thurston, State of Washington, in the full and just sum of Five Thousand Dollars * * *" which it binds itself to pay on the following conditions:

"Whereas, the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such Treasurer at the special instance and request of the State Bank of Tenino has deposited, or may hereafter from time to time deposit * * * certain moneys * * * for the custody, or for the proceeds of the face value of which said Treasurer as such may be

responsible. * * * Now if the bank shall in due and ordinary course of business promptly pay to the said Treasurer, upon demand and presentation of proper and valid checks therefor, in the usual and ordinary course of business, all moneys, etc. * * * deposited * * * by or on behalf of said Treasurer, and shall keep and hold harmless * * * the above named Robert Marr individually, and as such Treasurer, from all liability, loss and damage * * * by reason thereof * * * then the obligation to be void, provided, however, upon the further following express conditions:"

The first and second conditions refer to default, and are immaterial here.

The third condition, which it will be observed counsel for plaintiff in error inadvertently omitted to set forth in his brief (Brief, p. 6), reads as follows:

"THIRD: That the said surety shall not be liable hereunder except for the loss of moneys belonging to the said Robert Marr, treasurer, and which shall have been deposited with the aforesaid principal by the said Robert Marr, as treasurer aforesaid, or to his credit as such treasurer."

(Record, p. 12.)

The fourth, fifth and sixth conditions have no bearing on the case.

It is plain that the National Surety Company by an *express condition* of its undertaking provided that it should not be liable for the loss of any moneys belonging to any other treasurer than Robert Marr, and that it should not be responsible for any moneys deposited in the State Bank of Tenino by any other treasurer than Robert Marr. It is impossible to make this any plainer than as expressed by the parties themselves in this third express condition of their letter of credit. (If we may be permitted to use that term.)

Now, what did the indemnitors undertake and agree to do? Exhibit "B" (Record, p. 13), the indemnity agreement executed by them, and acknowledged by one of them, Isaac Blumauer, on June 24, 1911, two days later, when it became a binding agreement and being the only indemnity agreement executed by them, refers to the depository bond as being executed at their request, effective June 22nd, 1911, "covering deposits of the said treasurer, in said bank, reference to which bond or undertaking made for the purpose of certainty and a copy of which instrument is or may be hereto attached; and, whereas the company has signed and executed * * * the said instrument upon condition of the execution hereof, and upon the security and indemnity hereby and herein provided."

(Record, p. 13-14.)

The first condition refers to the payment of

the premium. The second condition is a general condition not necessary to consider here. The third and fourth conditions are similar. The fifth condition, being the one upon which plaintiff in error chiefly relies, provides, as follows:

“FIFTH: That no act or omission of the Company in modifying, amending, limiting or extending the instrument so executed by the Company shall in any wise affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof, or other and new obligations in its place or in lieu thereof, and without notice to us being expressly waived, and in any such case, we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, limited or extended instrument or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein.”

(Record, pp. 17-18.)

The instrument so executed by the Company was one by which it expressly stipulated that it should not be laible, except for the loss of moneys belonging to said Robert Marr, as Treasurer, which

should be deposited with the State Bank of Tenino by said Robert Marr as Treasurer, or to his credit as such Treasurer. Now, it had a right under the fifth condition of the indemnity agreement to alter, change or modify, amend, limit or extend that obligation, or renew it, or to execute a new one in its place, or in lieu of it, to Robert Marr, as Treasurer, not to his "successor." The obligation to which the provision referred particularly excepted every other treasurer, because it says, "said surety shall not be liable hereunder, except for the loss of moneys belonging to the said Robert Marr, Treasurer, and which shall be deposited by said Robert Marr as Treasurer, or to his credit as Treasurer."

If it had been intended to extend this right to the execution of like or similar instruments to the successor in office of Robert Marr, it would have been an easy matter to have indicated that fact by simply adding the words, and his successor, or successors.

So far as these defendants are concerned, and so far as the evidence in this case is concerned, they contracted for accommodation only, and without compensation, and come within the rule governing voluntary sureties, entitled to have their contract construed by the rule of *strictissimi juris*. With the advent of bonding companies chartered for the conduct of such business and entering into such undertakings for money consideration, a contract

being essentially an insurance against risk, underwritten for a money consideration prepared by experts in that line of business, requiring periodical reports from their principal, and keeping them under constant surveillance, there has arisen the rule of liberal construction of such contracts, but it is only out of consideration of the matters enumerated that the rule of liberal construction relative to compensated sureties has arisen. The rule, like all rules of law, is based upon reason, and where the reasons for invoking it do not exist it does not obtain.

But regardless of which rule is applied to defendants they are at least entitled to have their obligation interpreted by the ordinary rules of law, and they cannot be held liable beyond the strict terms of their contract. Their obligation may not be extended by construction or by implication.

U. S. F. & G. Co. vs. French Mut. Gen. Soc.,
212 Fed. 620.

Gilmore vs. U. S. F. & G. Co., 208 Fed. 277.
American Bonding Co. vs. Pueblo, 150 Fed.
17.

U. S. vs. Freel, 186 U. S. 309, 46 L. Ed. 1177.

Plaintiff in Error seeks to recover from defendants because W. H. Britt, the Treasurer of Thurston County, Washington, lost deposits made by him in the State Bank of Tenino, which it was required to make good under a depository bond executed by it to Britt on June 22nd,

1914, while the bond which defendants indemnified plaintiff against loss under was released in writing and discharged long before the loss occurred, and was specifically referred to in the indemnity agreement, and made a part of it, and provided that it should only stand as security for moneys deposited by Robert Marr, as Treasurer of Thurston County, Washington, and specifically excepted any and every other Treasurer. With these provisions made a part of their contract defendants said to the bonding company, you may renew that obligation; you may extend that obligation; you may execute a new obligation in lieu or in place of it, without giving any notice to us, but they did not any place say, you may execute a similar obligation to whomsoever may succeed Robert Marr as Treasurer of Thurston County, Washington. How can the responsibility of the defendants be extended to a loss suffered by plaintiff under an entirely new, different bond, containing different provisions, given by plaintiff in behalf of the bank to the successor in office of Robert Marr, without extending the terms of their agreement by making a new contract? Plaintiff in Error is asking this Court to write into their contract the words, "his successor or successors," when the parties who made the contract did not themselves see fit to do so, but did specifically provide that it should not stand as indemnity for the loss of any moneys, except moneys deposited by Robert Marr. It may have made a very material

difference in the view of the indemnitors as to the question of their responsibility between the Bank of Tenino and Robert Marr as Treasurer, and the Bank of Tenino and somebody else as Treasurer. They might very well have agreed to make good moneys which Robert Marr deposited in the bank, knowing him, knowing of his prudence, and knowing that he would not deposit money improvidently. These considerations may have formed a material ingredient in the judgment of the indemnitors in entering into this agreement.

As was well said in the case of *Birch vs. De Rivera*, 6 N. Y. S. 206:

“A man may be willing to guarantee A and B, but be unwilling to guarantee A and C; he may be willing to guaranty a firm composed of A and B, but not a firm composed of A and C; he may guaranty solely on the strength of B’s ability or caution. At all events, his contract cannot be altered and extended beyond his consent.”

To the same effect is *Strange vs. Lee*, 102 English Reports Reprint, 682.

In *Meyers vs. Edge*, 101 English Rep. Rep., 960, it is held that a promise in writing directed to A, B and C, a house in trade, to pay for goods to be furnished to another cannot be enforced in an action by B and C to recover the value of goods furnished after A had withdrawn from the partnership.

In the course of its opinion the Court, speaking through Lord Kenyon, said:

“I think that the rule ought to be made absolute. We are to judge on the contract that the parties have made, and ought not to substitute another in lieu of it. . Here the defendant contracted with Meyers, Fielden, Ainsworth & Co. Perhaps the defendant, when he entered into this contract, had great confidence in Ainsworth, and thought that he would use due diligence in enforcing payment of the goods from Duxbury regularly as they were furnished; at least it is too much for us to say that, after Ainsworth ceased to be a partner, the defendant would have given the same credit to the remaining partners. I disclaim going on the grounds of fraud in this case, the jury not having found that there was any fraud. If on a new trial the plaintiffs can produce any other evidence to affect the defendant, they will have an opportunity of doing so. But we cannot say that a contract, that on the face of it imports to have been made with five, ought to be construed to be a contract made with four persons only.”

In *Weston vs. Barton*, 128 English Rep. Rep. 495, it was held a bond conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity as bankers will not extend to sums advanced after the decease of one of the

five by the four survivors, the four then acting as bankers.

Lord Mansfield, speaking for the Court, observed thus:

“The question here is, whether the original partnership being at an end, in consequence of the death of Golding, the bond is still in force as security to the surviving four; or whether that political personage, as it may be called, consisting of five, being dead, the bond is not at an end. The case has stood over in consequence of doubts which the Court entertained on particular expressions in the bond. Many cases were cited at the bar; and the result of them is, that generally when a change takes place in the number of persons to whom such a bond is given, the bond no longer exists. These decisions certainly fall hard on the obligees; for I believe the general understanding is, that these securities are given to the banking house, and not to the particular individuals who compose it; and we should readily so construe the bond if the words would permit. The words of the condition on which the question depends (and which his Lordship now read over), again and again refer to the obligees’ capacity of bankers; they were bankers, only as they were partners in their banking house, as it is called, and this security is conditioned to pay any money ad-

vanced by 'them five or any or either of them.' Taking those last words by themselves, it might at first be conceived that if any one of the five advanced money, this bond should secure it, but the words are afterwards explained, when it is seen that the money is to be paid to the five. Now it could never be intended that money advanced by one of them singly, should be repaid to the five; and this shows that the words 'advanced by them or any or either of them' must be confined in their meaning to money advanced by any or either of them in their capacity of bankers, on behalf of all the five. This, then, being the construction of the instrument, from almost all the cases, in truth we may say, from all (for though there is one adverse case of *Barclay vs. Lucas*, the propriety of that decision has been very much questioned), it results that where one of the obligees dies, the security is at an end. It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction: it is very probable that sureties may be induced to enter into such a security, by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree

than the rest; and it may be, that the partner dying, or going out, may be the very person on whom the sureties relied; it would therefore be very unreasonable to hold the surety to his contract, after such change; * * * some would permit one who was almost a beggar, to extend his credit, to that sum; others would exercise a due degree of caution for the safety of the surety: and therefore we are of the opinion, that as to such sums only, which were advanced before the decease of Golding, can an indemnity be recovered by the plaintiffs; and as to the sums claimed for debts incurred since his decease, the judgment must be for the defendant."

See also,

Simpson vs. Cook, 130 English Rep. Rep. 181.

To the same effect is *Lyon vs. Plum*, 14 L. R. A. (N. S.), 1231, where the New Jersey Court of Error and Appeals, speaking through Justice Parker, reviewed the American and English cases on the subject, holding that any material changes in the status or composition of the party originally guaranteed will not be covered by the guaranty. The following may be found in the note appended to the decision:

"The case of *Grant vs. Naylor*, 4 Cranch, 224, 2 L. ed. 603, though not directly in point, is of interest in this connection. It was there

held, Chief Justice Marshall writing the opinion, that the firm of John and Jeremiah Naylor & Company could not maintain an action upon a guaranty addressed to John and Joseph Naylor & Company, notwithstanding that the guaranty was really designed for the former firm, for the reason that, the contract being in writing and within the statute of frauds, parol evidence was not admissable to vary its terms. The chief justice, however, remarked that the Court had felt considerable difficulty on the subject; and the decision was influenced largely by the feeling that the tendency to relax the statute of frauds ought not to be encouraged. He pointed out that the case was not one of ambiguity, either patent or latent; and that, if it was a case of mistake, it was a mistake of the writer, and not of him by whom the goods were advanced, and who claims the benefit of the promise."

See also *Crane Company vs. Specht*, 57 Northwestern, 1015, where the Supreme Court of Nebraska speaking through Harrison, Judge, disposed of a similar question in the following language:

" 'A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This

is a rule universally recognized by the courts, and is applicable to every variety of circumstances.' Again it is said: 'A surety, or guarantor, usually derives no benefit from his contract. His object, generally, is to befriend the principal. The guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms would be, not to enforce the contract made by him, but to make another for him.' In *Miller vs. Stewart*, 9 Wheat. 680, Story, J., says: 'Nothing can be more clear, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be, even, for his benefit. He has a right to stand upon the very terms of his contract, and, if he does not

assent to any variation of it, and a variation is made, it is fatal.' ”

In *Burge on Suretyship*, Chapter 3, it is said:

“A contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time, than is expressed or necessarily included in it.”

And further it is stated:

“In the Roman law the rule now under consideration assumes the form of a maxim, ‘An agreement of guaranty, made with one person, cannot be extended to another person.’ ”

The case of *Mechanics American Bank vs. Rowell*, 182 S. W. 990, recently decided by the Supreme Court of Missouri (1916), is highly instructive on several of the matters advanced by plaintiff in error. We will therefore quote from it at length.

The Mechanics National Bank in consideration of receiving the account of the J. H. Crane Furniture Company extended to the furniture company a credit in the sum of Twenty-five Thousand Dollars on the guaranty of Ellen S. Crane, a large stockholder in the furniture company, which guaranty was as follows:

“Whereas, the J. H. Crane Furniture Company may apply to the Mechanics’ National Bank, St. Louis, Mo., for discounts: Now, for value received, and in consideration of one dol-

lar paid to each of the undersigned, the receipt of which is hereby acknowledged, and other valuable considerations to them moving, I, Ellen S. Crane, jointly and severally for themselves, their executors and administrators, hereby guaranty to said bank, its successors and assigns, the prompt payment as they severally may mature, of all loans made or which may be made to said J. H. Crane Furniture Company by said bank, and of all notes, acceptances and other paper, which have been or may be discounted for the said J. H. Crane Furniture Co. to the amount of fifteen thousand dollars (\$15,000) by said bank, whether the same be made, drawn, accepted or endorsed by said Ellen S. Crane, as well as any renewals thereof; and this is intended to be a continuing guaranty and shall apply to and cover all loans and discounts and renewals so made by said bank prior to notice in writing given to the cashier of said bank, that the undersigned will not be liable upon any such loans or discounts made by said bank after the receipt of such written notice.

Whenever any such loans or paper, or any renewals thereof, shall become due and remain unpaid, the undersigned will, on demand, and without further notice of dishonor or protest, and without any notice having been given to the undersigned guarantors, previous to such demand, of the acceptance by said bank of this

guaranty, and without any notice having been given to the undersigned guarantors, previous to such demand, of the making or renewing of any such loans or discounts, pay the amount due thereon to said bank, its successors and assigns, and it shall not be necessary for said bank, in order to enforce such payment, to first institute suit or exhaust its remedies against said J. H. Crane Furniture Co., or other parties liable on such loans or paper; and notice to the undersigned of the acceptance of this guaranty and of the making or renewing of such loans or paper, and any of them, is hereby expressly waived by the undersigned.

But all paper discounted for said Crane Furniture Company and all loans made to said Crane Furniture Co., when paid, shall be deemed to have been paid by said Crane Furniture Company, unless express notice in writing is given to said bank at the time, by said guarantors, that it has been paid by them.

Executed this 14th day of February, 1905.

ELLEN S. CRANE."

Accepted:

Witness: JOHN R. MYERS.

The bank loaned Twenty-five Thousand Dollars to the Furniture Company. Later the guaranty and notes of the furniture company were delivered to the Mechanics' American National Bank, which was incorporated and sold its stock in exchange for a large part of the assets of the Mechanics' National

Bank, and another institution, the American Exchange Bank. Afterward the Mechanics' American National Bank loaned other moneys to the Furniture Company under the Ellen S. Crane guaranty. The Court denied the bank's right to recover under the guaranty.

In the course of its opinion it said:

"It is next insisted that the parties to the suit placed such a construction on the contract as to 'make it inure to the benefit of the plaintiff bank.' We are unable to assent to that view, in the light of the facts disclosed in the record. It does appear that the plaintiff bank acted upon the assumption that the terms of the written guaranty entitled it to hold the guarantor for loans which it made, and that the president of the furniture company took a similar view, but it was not established by the evidence that the guarantor, E. S. Crane, so regarded her contract, or that she made any representation to the plaintiff that she desired it to be the beneficiary of her written guaranty given to another bank. Mrs. Crane never at any time had any interview with any person representing the plaintiff. She was never seen or spoken to by any officer of the bank as to any transaction between it and the furniture company."

The case of *Saunders vs. Ducker* (Court of Appeals of Maryland, 1911), 82 Atlantic 154, in-

volved a contract more favorable to the plaintiff than the indemnity agreement here, yet a recovery was denied . An indemnity guaranty to cover the sale price of books was given to W. B. Saunders, which among other things provided that it should cover the whole period of the agency, "on whatever agreements, express, implied, altered, renewed or extended which might be made." This indemnity agreement was signed by one of the parties who solicited the agency. Later W. B. Saunders was incorporated under the name of W. B. Saunders Company, taking over all of the business of W. B. Saunders, and it was held that there was no liability.

The case of *Bennett vs. Draper* (Court of Appeals New York), 34 Northeastern 791, is a leading American case on the subject. In this case the guaranty went to H. C. Bennett & Company, their successors or assigns; the partnership of H. C. Bennett & Company was finally dissolved by death, and a new partnership under the same name advanced money under the guaranty. The case is too long to quote from at length.

In the course of its opinion, however, the Court laid down the following rule:

"In the absence of language in the guaranty showing that the parties intended that it should survive changes in the partnership, and inure to the benefit of the new firm as

well as the old, the defendant's contract terminated with the existence of the firm to which it was given. Add. Cont. 655; Story, Partn., Sec. 244-251; *Strange vs. Lee*, 3 East. 489; *Metcalf vs. Bruin*, 12 East. 400; *Schmitz vs. Langhaar*, 88 N. Y. 503."

" * * * It would be quite unreasonable to hold in such cases that a surety intended to contract indefinitely with parties unknown to him at the time, and that his obligation passed unimpaired through all changes and mutations of the firm to which it was given, and that a remote successor of the original obligee, by virtue of a purchase of its assets or otherwise, can use it in the same way as if it was made directly to him, and for his benefit. It cannot be supposed that such a result was within the contemplation of the parties. Nothing can be found in the record that would warrant the conclusion that the defendant contracted to be responsible to the plaintiffs for moneys advanced by them. Her obligation is limited to loans made by the firm, which it may be presumed she knew, and with which alone she had contractual relations. The judgment appealed from is right, and should be affirmed with costs."

It will not be presumed here that these indemnitors intended to bind themselves and their heirs and estates to indemnify the National Surety Com-

pany as long as Thurston County had a treasurer, and as long as the State Bank of Tenino, which was a corporation, existed and received deposits.

The trial court in its opinion (Record, p. 77), very properly found that the indemnity agreement was on a printed form, prepared by the bonding company itself, and therefore should be construed most strongly against it, and that the provisions of the contract should be limited rather than extended, and made the following observations:

“If not so limited, it is not clear but that the indemnitors might be bound so long as the bank continued in business and the county had money to deposit. Such a result would require language more clear and unambiguous. For that reason, I believe that the words about changing and modifying must be given some narrower meaning than they might otherwise have.”

(Record, pp. 78-79.)

In *Barns vs. Barrow*, 61 N. Y. 39, 19 American Rep. 247, the facts show that on October 20th, 1869, John W. Barns, one of the plaintiffs, agreed in writing to furnish Edward Barrow flour and feed to be handled on commission, and the defendant, John Barrow, guaranteed in writing that Edward Barrow should account Barns for the proceeds. Barns was a member of the firm of John W. Barns & Co., which firm, and not John W. Barns, furnished the flour and

feed to Barrow, and now brings action on the guaranty to recover a balance due from Edward Barrow. It did not appear that either Edward Barrow or defendant knew that the goods supplied belonged to the copartnership.

The appellate court in reversing a judgment on the guaranty said:

“The present case differs in an essential particular from those just cited. It is a case of pure guaranty; a contract which is said to be *strictissimi juris*; and one in which the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. The consideration of the contract does not inure to him, but to another. He assumes the burden of a contract without sharing in its benefits. He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, this is not my contract, *non in haec feodora veni*. Accordingly, in the present case, he may say, ‘I contracted with John W. Barns, and will not be liable for supplies furnished by a firm, though he may be a member of it.’

The authorities, when carefully considered, sustain this conclusion. Mr. Burge, in his

work on Suretyship, chap. 3, discusses this subject at length. He says: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, *to any other person*, or to any other period of time than is expressed, or necessarily included in it. It was in the power of the person accepting the surety to have expressed, and it is his own fault if he has not included *the case to which he seeks to extend the liability of the surety.*"

It is settled by all the authorities that a letter of credit addressed to a particular person is limited to him, and that the writer must be held to have granted it in reliance on the prudence and discretion of the person addressed, and such a letter gives no right to interpose the writer's credit or transmit his guaranty, unless such right is clearly expressed, or necessarily included in it.

Union Bank vs. Coster, 3 N. Y. 203.

Birckhead vs. Brown, 5 Hill, 634; S. C., 2 Den. 375.

Walsh vs. Bailie, 10 Johns 180.

Robbins vs. Bingham, 4 id. 476.

Penoyer vs. Watson, 16 id. 100

In *Daube vs. Philadelphia, etc.*, 77 Fed. 713, the Circuit Court of Appeals of the Seventh Circuit, considered the identical question involved here. It appears that for the purpose of enabling Daube

and Rosenheim to purchase coal on credit from the Philadelphia & Reading Coal & Iron Company, that Louis Daube gave the coal and iron company a written guaranty to the amount of Ten Thousand Dollars, guaranteeing the account of Daube and Rosenheim until revoked by notice in writing. Subsequently a receiver was appointed for the coal company. The receiver made sales to Daube and Rosenheim, relying on the letter of guaranty given by Daube. In holding that the sales made by the receiver were not protected by the guaranty, the Court said:

“The vital question is whether the sales made by the receiver to Daube & Rosenheim were within the scope of the contract of guaranty. They were not within the letter of the contract, and to include them by construction or intendment was, in our judgment, an invasion of the wholesome rule, recognized in the opinion below as elementary, ‘that a guarantor or surety may stand upon the strict letter of this contract,’ and can be liable only ‘within the clear terms of the obligation, and between the identical parties who are named in it.’ Any change in parties or terms, even though beneficial to him, if made without his consent, discharges him.”

“ * * * Is it to be said, in view of the strict rule by which the contracts of suretyship and guaranty are governed, that a guarantor, who

has become responsible for one of the parties to such a contract, is subject to consequences and contingencies dependent upon the election of any receiver who may be appointed for the other party? If such consequences are exceptional, and result, as has been suggested, from 'rules of policy appropriate to the equitable jurisdiction,' protection against them is no less important, and, as we conceive, no less clearly within the guarantor's right to insist upon the letter of his contract, than if invasions of his rights at law were involved."

It is also a well settled rule in the construction of guaranty contracts, that if the language is equally capable of two constructions, one that the guaranty is limited, and the other that the guaranty is continuing, that construction will be adopted which construes it to be limited.

Referring to the rule the Court in *Morgan vs. Boyer*, 48 American Reports 456, expressed itself thus:

"In applying these rules there has been much difference of opinion as to whether the language of a guaranty should be construed as creating a limited or a continuing guaranty, when it is fairly capable of either construction, but we are satisfied that the decided weight of authority is in favor of the rule stated by Judge Story, that in a doubtful case the pre-

sumption should be against the construction that the guaranty is continuing."

See *Cremer vs. Higginson*, Federal Case No. 3383 (opinion by Story, Judge, above referred to).

Merchants National Bank vs. Cole, 93 N. E. 465.

Cheshire Beef Co. vs. Thrall, 47 Atl. 160.

Sherman vs. Mulloy, 54 N. E. 345.

King Co. vs. Ferry, 5 Washington 552.

In this connection counsel cite the case of *United States vs. Bailey*, 178 Federal 302, and *American Surety Co. vs. Campbell*, 138 Federal 531.

(Plaintiff's Brief, p. 46.)

In the Bailey case a railroad company gave a bond signed by the defendant trust company, binding themselves, their executors, administrators, successors and assigns, jointly and severally in the sum of Three Thousand Dollars, to the United States, which the principal and surety, *their successors or assigns*, agreed to pay, etc. Subsequently a receiver was appointed for the railroad company, and while operating the railroad caused a fire resulting in damage to the United States, and an action was brought on the bond. The court was of the opinion that the word "successor" found in the conditions of the bond would hold the guaranty company.

In the Campbell case a bond to discharge an attachment was given to Homer, Receiver of

Campbell & Zell Company, a corporation, to be paid to Homer, his successors and assigns. The corporation was the real party in interest, and the Court held that the term "successor" was not limited to a receiver, but also meant succession to control by the corporation itself on the termination of the receivership.

In the course of its opinion the Court said:

"*Bonds* which provide for and express the idea of *succession in respect* to obligees contemplate that whoever succeeds to the right of control over the right of action involving the subject matter to which the contract relates shall be the obligee, and have a right of action to enforce the obligation."

These two cases relied upon by plaintiff in error are really authorities in defendants' behalf, because in each case the idea of the bonds running to the obligee's successor was clearly expressed. No such provision, however, is made in the indemnity bond or depository bond involved in this action.

Counsel finally contend (Plaintiff's Brief, p. 48), that the County was the real party in interest, and try to pass the situation off by referring to the Treasurer as a sort of a figurehead.

The statute of the State of Washington relative to County Depositories, Section 3943, R. & B. Code, after authorizing the Treasurer to make deposits of

county moneys in banks furnishing security, provides:

“But nothing done under the provisions of this section shall alter or affect the liability of any County Treasurer, or of the sureties under his official bond.”

In *Kittitas County vs. Travers*, 16 Washington 528, the Supreme Court of this state held a County Treasurer and his bondsmen liable for loss of public moneys through the failure of a bank where they had been deposited by the Treasurer with the knowledge, consent and approval of the County Commissioners.

In *Fairweather vs. Hedges*, 14 Washington 119, it was held that a County Treasurer was strictly accountable for all moneys coming into his hands, regardless of what care he exercised in the selection of banks in which to deposit such funds, and this is so even if the County had not provided him with a suitable and safe place in which to keep its funds, so that the question of personal equation enters largely into such a transaction.

The defendants in error could very well say that they had abundant confidence in the personal equation of Robert Marr to the effect that he would safely conserve and care for the public moneys, and would cease to deposit the same with the State Bank of Tenino at any time that such depository would seem to him to be insecure, and

having confidence in his ability in that respect would sign the indemnity bond in question, but would not become so obligated when W. H. Britt became County Treasurer, and entrusted with the same supervision of public moneys as Robert Marr.

Plaintiff in Error, on page 38 of its brief, uses the following language:

“This new or substituted bond was executed on the request of Hays, who was one of them, and was signed by Blumauer as president, and Hays as cashier, both of whom were indemnitors and defendants in this action.”

This is an artful effort on the part of counsel to confound the rights of the defendants in error, Mentzer and wife, Campbell and wife, and Eva Copping, with Blumauer as president and Hays as cashier. As a matter of fact the indemnitors Blumauer and Hays did not appear in this case, and judgment went against them by default, and the issues involved herein are strictly between the plaintiff in error and the indemnitors, who appeared herein, and who do not include Blumauer and Hays. In connection with this it is significant that while the application for the original depository bond, to-wit, the depository bond dated June 22, 1911 (Record, p. 87), contains the recitations that T. F. Mentzer is vice president (defendants' Exhibit “A,” Record, p. 125-126), the application for the second depository bond, dated June 22, 1914 (Record, p. 112-113), does not contain such

recitation, and recites that the officers are Isaac Blumauer, president, and W. Dean Hays, cashier (Defendants' Exhibit "B," Record, pp. 130-131). As a matter of fact Mr. Mentzer had resigned as an officer of the bank prior to the execution of the second depository bond (Defendants' Exhibit "E," page 132, Record). The indemnitors appearing herein do not stand in the same position as the indemnitors Blumauer and Hays by any means, and counsel's record herein is of no avail.

Plaintiff in Error pays considerable attention to the seventh provision which provides that it binds the indemnitors, their heirs and assigns forever, until the company shall have executed a release under its corporate seal, attested by the signature of its proper officers, etc. This provision is not enforceable, being contrary to public policy, since the right of a party to waive the protection of the law is at all times subject to the control of public policy, and such right cannot be set aside or contravened by any arrangement or agreement of the parties however expressed.

Fidelity & Casualty Co. vs. Eickhoff, 30 L. R. A. 586.

Fidelity & Deposit Co. vs. Nordmarker, 155 N. W. 669.

Counsel lay considerable stress on the rights of the surety company under the eighth provision of the indemnity agreement (Plaintiff's Brief, p. 26),

which provides that the indemnity shall be available in its behalf for all former or subsequent bonds executed by it. Such bonds, of course, would only be bonds coming within the terms of the indemnity agreement.

In conclusion plaintiff contends that the judgment should be reversed, and the trial court directed to enter judgment in its favor, against defendants for the amount sued for. Its position in this connection is as faulty and erroneous as it is in connection with the other questions discussed. The judgment of the Court was one of dismissal entered on defendants' motion for non-suit, and before defendants had been put to proof on their defense. To enter a judgment against them at this stage of the proceeding would be to deprive them of their day in court, a disposition, which we might add, too often characterizes the conduct of these companies.

In conclusion, we submit, that the parties to this action made their own contract; plaintiff prepared it on its own printed form; it is not general, but is specific and lengthy in its many provisions, and covers almost every possible situation and condition that might arise. The contract by its terms nowhere provides that their obligation may be extended to any other contract, or contracts, than those made between plaintiff and Robert Marr. Defendants for reasons no doubt personal to themselves, did not undertake to be responsible for the

performance of a contract between plaintiff and Robert Marr's successor, or successors, and now that litigation has ensued it is not the province of the Court to step in and make a new contract for the parties to enable plaintiff to recoup its loss.

We most respectfully and earnestly insist that the judgment of the Lower Court should be affirmed.

CHARLES O. BATES,
CHARLES T. PETERSON,
PRESTON M. TROY,
ROBERT F. STURDEVANT,
Attorneys for Defendants in Error.

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In the United States Circuit Court of Appeals

for the Ninth Circuit

NATIONAL SURETY COMPANY, a corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA J. HAYS,
his wife; T. F. MENTZER and ELIZABETH E.
MENTZER, his wife; A. D. CAMPBELL and JESSIE
E. CAMPBELL, his wife; DAVID COPPING and EVA
COPPING, his wife, Defendants in Error.

Reply Brief of Plaintiff in Error

C. B. WHITE,
Seattle, Washington;

JOHN D. FLETCHER,
ROBERT E. EVANS,

Tacoma, Washington,

Attorneys for Plaintiff in Error.

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COPPING, his wife, Defendants in Error.

Reply Brief of Plaintiff in Error

No. 2967.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE
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his wife; T. F. MENTZER and ELIZABETH E.
MENTZER, his wife; A. D. CAMPBELL and JESSIE
E. CAMPBELL, his wife; DAVID COPPING and EVA
COPPING, his wife, Defendants in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

We desire to submit the following observations in replying to the brief of defendants in error:

Counsel for defendants in error raises the question of our not having pleaded estoppel and that objection is raised as such for the first time in this case in their brief. Our answer to that proposition is twofold:

First: The letters offered in evidence are not strictly for estoppel, and it is our view that an estoppel as such is not in issue.

The question is one of construing the indemnity

agreement

~~in error~~. In considering this question the Court will consider the language of the agreement, the purpose to be accomplished, and the meaning placed upon it by the parties.

These letters are essential to show not only the purpose to be accomplished but also the meaning, understanding and situation of the parties. This is certainly permissible, as will be seen by reference to the cases cited in *Barnes vs. Barrow*, 61 N. Y. 39, cited by the defendants in error.

Second: The matter of pleading was not presented to the Trial Court. No such objection was brought to the attention of the Trial Court by the defendants in error, and therefore was waived and cannot now for the first time be urged in this court.

When the evidence complained of was offered, the objection interposed was that it was immaterial and irrelevant; not that a plea of estoppel had not been interposed, or that as the pleading stood, such evidence was not admissible. If such an objection had been made and sustained, plaintiff in error would have had an opportunity to amend, and if amendment should have been refused could have moved for a voluntary dismissal. The Trial Court admitted the evidence and there was no claim of surprise or that the pleadings did not

justify the proof, but the case was tried on the assumption by all that the pleadings were sufficient.

McDonnell v. DeSoto Sav. Bldg. Assn., 75 S. W. 438.

On page 27 of defendant's brief, it is stated that the indemnity agreement was acknowledged only by Blumauer. This is incorrect. It was acknowledged by all of the indemnitors and they were all parties to it. (Record p. 20 and p. 103.)

On the same page it is said with reference to the bond "covering deposits of *said* treasurer." The personnel of the treasurer is not mentioned in the indemnity agreement and "said treasurer" has reference as the indemnity agreement will show, to the "Treasurer of Thurston County." (Defendants' brief, p. 8.)

On page 29 it is said that the defendants "contracted for accommodation only." We believe we have shown this to be incorrect in our original brief.

These indemnitors recited in their agreement that they have requested the plaintiff in error to execute the bond, and that plaintiff in error has executed it upon consideration of their executing the indemnity agreement; they acknowledge receipt of one dollar as the money consideration and agree to pay plaintiff in error an annual premium of twenty-five dollars as com-

pensation "for the accommodation afforded the undersigned by the execution of said instrument by the Company."

They were the officers of the bank, conducted its business and comprised its Board of Directors, and owned all but 12 shares of its capital stock, and the execution of the bond was for their direct benefit, and for the purpose of enhancing their personal riches. They were certainly not volunteers or accommodation sureties, but compensated ones.

On page 32 of the brief of the defendants in error it is suggested that there would be a difference in guaranteeing the financial condition of their bank if Marr controlled the deposits of the county moneys, and if Britt did so.

We cannot reason this out. They were in fact guaranteeing against themselves as they were in entire control in conducting and operating the bank. Their liability was limited to \$5000. They were in control of the situation, no matter what treasurer would make deposits. They could stop the deposits at any time and could at any time cease to become a depository of county moneys. They were in a position much better than Marr or Britt to know the financial condition of their bank, and it was to their inter-

ests, and not the interest of Marr or Britt, who would be protected in any event by the surety bond, to see that deposits were not accepted if the financial condition of the bank did not warrant. We are unable to see what difference the personnel of the County Treasurer made.

As we read the authorities cited on this subject, they are not applicable to a situation of this kind. They do not involve the guarantee of one's own business, which primarily is to result in one's financial gain.

Counsel misconstrues the real purpose of our reference to *U. S. v. Bailey*, 178 Fed. 302, and *American Surety Company v. Campbell*, 138 Fed. 531. Our effort was to show that the real purpose of the transaction should control.

On page 53 it is suggested that the other defendants would not be bound by the request for a substitute bond made by Hays and Blumauer, but we submit their agreement, which recites the contrary. (See Sec. 8 of Indemnity Agreement, ^{Defendants} Appellant's Brief, p. 14.)

It is also suggested that we are attempting to confound the rights of Mentzer, Campbell and Copping with those of Blumauer and Hays. This is not our

intention. Mentzer was Director and Vice-President, and Campbell a Director and Assistant Cashier. The application for the substitute bond was authorized by the Board of Directors. (Record p. 136.) The judgment is in favor of all the defendants. It dismisses the action as to all and awards costs to all, and all appear as defendants in error by their attorneys (Record p. 50). (^{Defendants}~~Appellant's~~ brief title page, and signatures on page 56.)

On page 54 it is stated as a fact that defendant in error Mentzer resigned prior to the substitute bond. The records of the bank do not show that such resignation was accepted, however. There is not even such a claim made on behalf of defendant in error Campbell.

As to defendant in error Mentzer, defendants, as a part of the cross-examination of plaintiff's witness Langley, identified by him and offered in evidence defendants' Exhibits E and F, which were, we think, clearly inadmissible as not cross-examination but a part of defendants' defense, and our objection on that ground should have been sustained. (Record p. 73) (Assignment of Error Record p. 140).

Exhibit "E" (Record p. 137) is a letter dated March 8th, 1913, from Mentzer to President Blu-

mauer, tendering his resignation as *Director* and requesting that it be submitted to the Board at its next meeting. It was clearly not proper cross-examination.

Exhibit "F" (Record p. 138) is a letter dated the same date from Mentzer to President Blumauer, enclosing Exhibit "E." He closes the letter with the following statement: "The bank ought to be organized with new blood and new capital. I am willing to step down and out as I do not think I am adding any strength to it at the present time."

The evidence contains a statement of all the meetings of the Directors from January 10th, 1911, to the close of the bank. They show that Mentzer was Director and Vice-President and Campbell Director and Assistant Cashier, and no minutes recorded any resignation. (Record pp. 71-72.) These letters tendering Mentzer's resignation do not purport to be a resignation for the office of vice president nor does it appear that his tendered resignation from the Board was ever accepted.

On page 54 two cases are cited to the effect that the clause in the agreement that the indemnitors would at all times keep plaintiff in error indemnified (Second par. ^{*Defendants*} ~~Appellant's~~ Brief, p. 10), and that they will continue liable until there shall have been furnished

plaintiff at its New York Office proof of release (~~Appellant's~~^{Defendant's} Brief, bottom of page 9), and that the agreement binds them and their heirs until plaintiff in error shall execute a release under its corporate seal and signature of its officers (~~Appellant's~~^{Defendant's} Brief, p. 14), is contrary to public policy.

The two cases cited do not so hold, but do hold that a stipulation that vouchers received by plaintiff in settling its liability shall be *conclusive* proof of such liability against these indemnitors, is void as against public policy. But if the stipulation only made such vouchers *prima facie* evidence, then it would be valid.

However, this latter doctrine is denied and the stronger contrary doctrine laid down in,

American Bonding Co. v. Alcatraz Const. Co.,
202 Fed. Rep. 483;

Ill. Surety Co. v. Maguire, 145 N. W. 768;

Guaranty Co. of North America v. Pitts, 30 So.
758.

After all is said, the question to determine is, was the indemnity agreement in force when the bank failed? What was the purpose to be accomplished and what the intention of the parties, and their situation?

There is no complaint of the first year's extension which carried the bond and the indemnity agreement

over into Britt's term, to June 22nd, 1913. At that time the bond was the same as though Britt were the treasurer named in it. He had been making deposits under the protection of this bond for five months, and the defendants in error had received such deposits knowing no new bond had been given, and that their indemnity agreement had not been released, but was still held by plaintiff in error.

When this year expired, acting through Hays, the bank paid the premium and extended the bond for another year, and gave the receipt showing that fact to Treasurer Britt, and he continued to deposit county moneys, and the bank, controlled by defendants in error, continued to receive the same all under the protection of this bond with the indemnity agreement unreleased, but still held by the plaintiff in error, the defendants in error having agreed to keep the plaintiff in error at all times indemnified.

Now at the end of the third year, the same procedure was contemplated, the premium paid through Hays, and receipt continuing the bond for another year was filed with Treasurer Britt. But then after some correspondence, it was determined to *substitute* a new bond for the old one, this procedure is all in conformity with the indemnity agreement as may be

seen by its reading. The substituted bond was in effect the same as though the old bond had been continued by the receipt as it had been theretofore.

The purpose was to make and keep defendants' bank a depository of county moneys to be deposited by whoever might be treasurer, and to protect plaintiff in error from loss by reason of such deposits.

We submit that the plaintiff in error ^{made} ~~had~~ a case to be submitted to the jury, and the judgment of the Trial Court should be reversed and in any event, a new trial granted.

C. B. WHITE,
Seattle, Wash.;

JOHN D. FLETCHER,
ROBERT E. EVANS,
Tacoma, Wash.,

Attorneys for Plaintiff in Error.

